Supreme Court, U.S.
FILED

961361 FEB 24 1997

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No. ____

In The

Supreme Court of the United States

October Term, 1996

ROBERT E. GRIJALVA,

Petitioner,

vs.

DEPARTMENT OF INTERIOR,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR WRIT OF CERTIORARI OF ROBERT E. GRIJALVA

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QUESTION PRESENTED FOR REVIEW

Did The Court of Appeals eviscerate the language of 5 USC sec. 2302(b)(8)(A) and thwart Congressional intent in affirming the Merit System Protection Board's application of a *subjective* rather than *objective* "reasonable belief" standard for protected whistleblower disclosures, where it found that the Petitioner-employee's professional responsibility complaint to a state agency against a government-retained appraiser was not based upon a *subjective belief* that any law, rule or regulation had been violated?

PARTIES TO THE PROCEEDINGS BELOW

The names of all parties to the proceedings, and their parent and subsidiary corporations, appear in the caption of the case.

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REPORTS AND OPINIONS BY OTHER COURTS AND AGENCIES

The United States Court of Appeal for Federal Circuit entered an order dated November 25, 1996 affirming without opinion the MSPB decision upholding removal of the Petitioner from his federal employment. (App. 47).

The full Board of the MSPB had discretionary jurisdiction to review the administrative judge's (AJ) initial decision (ID) under 5 CFR sec. 1201.115, but declined that review by order dated November 9, 1995. (App. 44).

The Initial Decision of the Administrative Judge contained findings of fact and conclusions of law entered on April 21, 1995. (App. 1).

GROUNDS FOR SUPREME COURT JURISDICTION

This Court has jurisdiction to review the Federal Circuit's affirmance without opinion by writ of certiorari pursuant to 28 USC section 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

United States Constitution:

> Amendment I. Congress shall make no law * * * abridging the freedom of speech, or * * * to petition the Government for a redress of grievances.

Statutes: The Whistleblower Protection Act:

5 USC sec. 2302(b)(8) provides:

[A recommending or deciding official] * * * shall not * * * –

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of –

(A) *any disclosure of information* by an employee or applicant which the employee or applicant reasonably believes evidences –

(i) a violation of *any law,* rule or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not *specifically prohibited by law* and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; * * *

(Emphasis added).

5 USC sec. 2302 provides:

(a)(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b) of this section.

(2) For the purpose of this section –

(A) "personnel action" means –

* * *

(iii) an action under chapter 75 of this title or other disciplinary or corrective action;

* * *

5 USC sec. 1221(e)(1) provides:

Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure described under section 2302(b)(8) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant. The employee may demonstrate that the disclosure was a contributing factor in the personnel action through circumstantial evidence, such as evidence that –

(A) the official taking the personnel action knew of the disclosure; and

(B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action.

5 USC sec. 1221(e)(2) provides:

Corrective action under paragraph (1) may not be ordered if the agency demonstrates *by clear and convincing evidence* that it would have taken the same personnel action in the absence of such disclosure.

(Emphasis added).

Legislative History:

Excerpts of the legislative history of the 1994 Amendments to the Whistleblower Protection Act are set forth separately in the appendix, as follows: House Report (App. 53), Senate Report (App. 48), and Floor Statement (App. 58).

CONCISE STATEMENT OF CASE AND MATERIAL FACTS

A. Statement of Proceedings:

The Federal Circuit appeal was for review of a final order of the MSPB dated November 9, 1995 denying review of an initial decision by an administrative judge sustaining the agency's removal of the employee, and rejecting his claims that he was terminated for making a protected disclosure, contrary to the prohibitions of 5 USC sec. 2302(b)(8).

By memorandum dated February 11, 1994, the Bureau proposed to remove the employee from his position for (1) disclosing confidential appraisal information in a professional responsibility complaint to the Arizona Appraisal Board about a government-retained private appraiser; (2) insubordination for one breach each of the employee's "signatory" and "appraisal review" authority, both of which had been suspended because of said disclosure; (3) repeated failure to follow instructions and failure to cooperate with a local Department of Justice (DOJ) condemnation attorney regarding requests for

appraisal data from the employee's office, and the preparation of an appraisal report with a higher degree of "formality" that his supervisor had requested; (4) and misuse of government resources (staff time and one helicopter ride) performing an unauthorized appraisal. The employee contested all four charges on factual and legal grounds. Particularly, the employee affirmatively defended against charges (1) and (2) on the basis of protected whistleblower activity under 5 USC sec. 2302(b)(8), and contended that but for his protected activity, charges (3) and (4), based on facts occurring within the preceding two years and never before asserted, would never have been brought.

The AJ sustained the Bureau as having proven all four charges by a preponderance of the evidence, and rejected the whistleblower defense at the threshold level that the employee had failed to prove the existence of a protected disclosure:

> In sum, I find that the appellant has failed to show that his disclosure [to the Arizona Appraisal Board] of the confidential information contained in the [government-retained private] appraisal of the [condemnation] property was a protected disclosure under 5 USC sec. 2302(b)(8).

(App. 31, ID at 29). Consequently, the AJ did not reach the issues of whether the Bureau would have proposed the removal of the employee had he not made the disclosure, and whether the record would have sustained the Bureau's effort to do so by the "clear and convincing evidence" which would have been required under 5 USC sec. 1221(e)(1) and (2).

For unexplained reasons, the Board concluded that the petition did "not meet the criteria for review set forth in 5 CFR sec. 1201.115". (App. 44, Order p. 1).

B. Statement of Material Facts:

The Petitioner-employee had 21 years of federal service with a spotless record at the time of his removal. For the seven years immediately preceding removal, the employee had been not only the Chief Appraiser in the Department of Interior's Phoenix Area Office of the Bureau of Reclamation, but was also the designated Review Appraiser for the region. He supervised an in-house staff of several appraisers, and reviewed the work of private appraisers providing services to both the Bureau and the local Department of Justice (DOJ) office which handles the Bureau's condemnation litigation. In the present case, the DOJ had commenced condemnation proceedings against a parcel of acreage known as the "Zane Johnston property". The DOJ attorney had retained a private appraiser, Mr. Con Englehorn, to appraise the Johnston property. An appraisal two years earlier by Mr. Iver Johnson had revealed the possibility of structures being included on the Johnston acreage which, in fact, were not located on it but were "off-site". When the DOJ appraiser, Mr. Englehorn completed his appraisal, he had failed to note the off-site nature of these structures. The Petitioner-employee noted this when Englehorn's appraisal was reviewed.

The record is undisputed that the agency would not have proposed removal of the petitioner-employee, and commenced an investigation into possible past misdeeds,

but for the fact and content of his disclosure. The removal action against the employee resulted from his confidential professional responsibility complaint (known as a "referral") on October 27, 1993 to the Arizona Appraisal Board about Mr. Englehorn for various violations of Arizona's professional responsibility rules for licensed appraisers. The Petitioner-employee noted in his complaint about Englehorn that it was difficult for him to believe, that given the earlier Iver Johnson appraisal and the fact of federal court litigation, that neither the local DOJ attorney nor Englehorn could still have remained ignorant about the off-site status of the structures. The referral stated in pertinent part:

> This date of taking report will be used in a condemnation action in Federal Court. It will be the basis for Mr. Con Englehorn's testimony in court. The appraisal report is and will be misleading to third parties, i.e., judge and jury.

(JA5256, Ex. 4K15, p. 6).[1] The employee's referral further stated:

> Given the number of times this parcel was appraised, I find it difficult to believe that Mr. Englehorn was not informed the improvements were off the subject property, and cannot believe that it was accidental that he valued them as part of the real estate. I am more inclined to believe that it was a willful attempt by someone else to influence the appraiser to arrive at a higher value by including the improvements.

(JA5258, Ex. 4K15, p. 8).

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[1] The "JA" references made herein are to the joint appendix filed by both parties with the Federal circuit.

One week after making the referral, on November 4, 1993, a staff DOJ review appraiser, J.D. Eaton, MAI, issued his review of the Englehorn appraisal. (JA5267-87, Ex. 4K17). Mr. Eaton noted the existence of the Iver Johnson appraisal prepared approximately one year earlier on March 5, 1992, and distinguished it as a far better product than Englehorn's:

> Comparatively speaking, the report prepared by Iver Johnson, and previously reviewed, would appear to have substantially more validity, and be a better document for trial purposes, than this appraisal report.

The Eaton review further stated:

> This discussion, as well as other comments by the appraiser throughout the report, suggests that the appraiser considered the impact of the government's project when estimating the value of the subject property. This is improper and may *well invalidate this report.*
>
> * * *
>
> There is *no mention* by the appraiser whether any, or all, of these improvements are located within the area of the subject site or whether they are, or may be, encroaching on the lands or others.
>
> * * *
>
> If the appraiser could be convinced to correct his appraisal report, it appears that the resulting value estimate would be substantially below the value reported here. And if that were the case, *the appraiser would be subject to destruction on cross-examination.* There would not appear to be any legitimate means of keeping the above

> value estimates from the trier of fact if this appraiser is used as an expert witness.
>
> Because this appraisal report can't be accepted and the fact that, if the report were corrected (which would surely result in *a substantially lower indicated value*), the appraiser would be subject to devastating cross-examination, there seems to be *little alternative but to recommend that a new appraisal be obtained from a different appraiser.*

(JA5268-69, JA5270, JA5273, emphasis added). The ALJ made no references to these findings by the DOJ's Mr. Eaton.

However, also like Eaton's strong criticisms of the Englehorn appraisal, those of Dr. John Salazar, Petitioner-employee's technical supervisor and Chief Appraiser of the agency nationally, were ignored in the AJ and Board decisions. Dr. Salazar was highly critical of Mr. Englehorn's appraisal:

> Q. All right. Now, when you noted this problem [omission of reference to the off-site structures], what did you do?
>
> A. I called up Con Englehorn.
>
> * * *
>
> A. * * * I had noted a *major problem* with his appraisal, * * * some of the improvements being off the subject property.
>
> Q. And what was Mr. Englehorn's response?
>
> A. He was upset. He says, "Why didn't I know about this?" * * * And I said, "Well, *you know who we are and where we are. You could have contacted our folks in the office down there or*

> *myself*". * * * [A]nd he said, "I was hired by the solicitor's office, you know, I'm not working for you guys" and I said, "Well, yeah, I know that, but *as an appraiser you have the responsibility to pursue every form – and research the subject completely*".
>
> * * *
>
> And I asked him, "Well, now what do you intend to do about this?" And he said, * * * *"I'll wait until I see your written review before I decide what I'm going to do*". That's more or less the words that he used.

(JA16418-20). (Emphasis added). Petitioner employee discussed his criticisms of the appraisal with Dr. Salazar *prior* to making his complaint to the Arizona Appraisal Board, confirming the reasonableness of his beliefs.

BASIS OF JURISDICTION IN CIRCUIT COURT AND MSPB

The Federal Circuit had jurisdiction to review final decisions of the MSPB pursuant to 5 USC sec. 7703(c). The MSPB had subject matter jurisdiction under 5 USC sec. 7511-13 and 7701(a) of the Petitioner-employee's appeal from the Bureau's final decision to remove him from federal service. The full Board of the MSPB had discretionary jurisdiction to review the administrative judge's initial decision under 5 CFR sec. 1201.115. The petition for review to the Federal Circuit was timely filed on December 13, 1995.

ARGUMENT FOR ALLOWANCE OF THE WRIT

Summary of Grounds for Review: There are two primary grounds upon which this petition is based.

First, the Federal Circuit has ignored both the language of 5 USC sec. 2302(b)(8)(A), and clear Congressional intent, which provides protection for a whistleblower who "reasonably believes" that his disclosure evidences the violation of any law, rule or regulation. The MSPB, and the agency in its Federal Circuit brief, took the position that the statute imposes a dual subjective and an objective belief standard. Congress, however, has gone to pains to make clear that "any disclosure" is protected, regardless of motive or other subjective considerations.

Secondly, this Court needs to give guidance and supervision to the Federal Circuit in view of Congress' repeated and failed efforts to have that court and the MSPB honor the intent of the legislation in protecting whistleblowers. Because of the Federal Circuit's monopoly in judicially reviewing MSPB decisions, conflicts in the circuits cannot occur, and the opportunities for certiorari by this Court are greatly diminished. However, the importance of giving meaning to Congressional enactments warrants certiorari being granted in this case.

I. The Federal Circuit's Affirmance without Opinion of the MSPB's *Subjective* "Reasonable Belief" Standard Eviscerates the Language of 5 USC sec. 2302(a)(8)(A), and Thwarts Congressional Intent Set Forth in Clear Legislative Histories.

A. Subjective Belief or Motivation Used by MSPB:

The AJ applied a subjective or genuine belief standard based upon her perceptions of the motivations of the Petitioner-employee. The AJ repeatedly referenced her view that had the employee truly believed that the Englehorn appraisal warranted complaint to state appraiser authorities, then he would have similarly complained about the earlier Iver Johnson appraisal. The AJ erred in her focus on appellant's subjective motives or inconsistencies in reporting Englehorn, but not a prior contract appraiser, Mr. Iver Johnson:

> I note that there is no evidence that the appellant filed a referral against Iver Johnson for providing an appraisal of the Johnston property that included the off-site improvements. Nor did the appellant consider himself culpable or guilty of a felony, as the person requesting the appraisal, because the Johnson appraisal included the off-site improvements when there was sufficient information at the time of the Johnson appraisal to show that the improvements included in the appraisal were off-site.

(App. 31, ID at 24).

Although the AJ avoided express findings that the employee was ill-motivated toward Englehorn, such motivation is plainly the basis for her distinguishing the employee's reporting of Englehorn but not Iver Johnson.

The implication is that the employee wanted to get Englehorn, but not Iver Johnson, and that his failure to get both evidenced his lack of belief that Englehorn had done anything wrong. No matter how presented, this focus on the employee's subjectively disparate treatment of the two appraisers reveals the AJ's employment of a subjective, rather than objective, "reasonable belief" standard.

B. The Agency's Adopted Subjective Test:

The Agency brief to the Federal Circuit pulled no punches in urging that court to adopt its *subjective* reasonable belief test as primary:

> However, the question of whether the employee genuinely believes that his or her disclosure evidences a violation of law, rule, or regulation, or gross mismanagement, gross abuse of authority, etc., is clearly relevant and a proper subject of inquiry for the board. * * * The requirement that the employee's belief be *objectively* reasonable is a *secondary* requirement.
>
> Put another way, if a reasonable person would believe the disclosure evidenced a violation of law etc. but the purported whistleblower did not in fact hold that belief, he could hardly be considered a whistleblower. Pursuant to 5 U.S.C. 2302(b)(8), the protected disclosure must be one which "the *employee* reasonably *believes* evidences a violation . . . " [Emphasis added]. The word "reasonbly" is an adverb modifying the word belief, but it is the employee who must hold the (reasonable) belief.

(Agency brief, pp. 11-12).

C. The Statute and Congressional Intent:

The statute, 5 USC sec. 2302(b)(8), protects "any disclosure" which the petitioner-employee "reasonably believes" evidences the "violation of any law, rule or regulation". There is nothing in this statutory language which would suggest the concept of "subjective", or "genuine", or properly "motivated". The term "reasonable" is synonymous with "objective".[2] Indeed, the legislative history addresses itself to the need for a public policy which does not allow whistleblower protections to be denied by focus on motive or other unobjective factors.

Congress has created a legislative history which makes clear its intent that *any* objectively *reasonable* disclosure will trigger the "clear and convincing" evidence burden on the agency to show it would have removed the Petitioner-employee even if he had not made the disclosure. This legislative history has been set out in committee reports, which this Court recognizes as being entitled to great weight. *Garcia v. United States*, 469 US 70,

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[2] In a different but related context, this Court has held that qualified immunity in civil rights cases turns upon whether a government official's belief about the state of the law is "reasonable". In *Anderson v. Creighton*, 483 US 635, 97 L Ed 2d 523, 107 S Ct 3034 (1987), the Court explained that implementation of the public policy behind immunity prohibits courts fron focusing on the subjective beliefs of the official, but instead only upon what is "objectively reasonable". The issue is whether a similarly situated official "could have believed" as the official at hand did, the test being "objective legal reasonableness". *Id.*, 97 L Ed 2d 530. Under this test, the official's "subjective beliefs * * * are irrelevant". *Id.* at 532.

83 L Ed 2d 472, 478 (1984), and *Thornburg v. Gingles*, 478 US 30, 92 L Ed 2d 25, 43-44, 106 S Ct 2752 (1986). As the Senate Report on the 1994 Amendments plainly stated:

> The Committee * * * reaffirms the plain language of the Whistleblower Protection Act, which covers, by its terms, "any disclosure", of violations of law, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. The Committee stands by that language, as explained in its 1988 report on the Whistleblower Protection Act. That report states:
>
> > The Committee intends that disclosures be encouraged. The OSC, the Board and *the courts should not erect barriers to disclosures* which will limit the necessary flow of information from employees who have knowledge of government wrongdoing. For example, *it is inappropriate for disclosures to be protected only if they are made for certain purposes* or to certain employees or only if the employee is the first to raise the issue. S. 508 emphasizes this point by changing the phrase "a disclosure" to "any disclosure" in the statutory definition. This is simply to stress that any disclosure is protected (if it meets the requisite reasonable belief test and is not required to be kept confidential).
>
> * * *
>
> As indicated above, the plain language of the Whistleblower Protection Act extends to retaliation for "any disclosure", regardless of setting of the disclosure, the form of the disclosure, or the person to whom the disclosure is made.

See App. 52, 5 U.S. Code Cong. & Adm. News 3549, pp. 3558-59, 103rd Congress – 2nd Session (1994) ("Senate Report").

To the same effect is the floor statement made by Senator McCloskey:

> It also is not possible to further clarify the clear statutory language in section 2302(b)(8)(A) that protection for "any" whistleblowing disclosure evidencing a reasonable belief of specified misconduct truly means "any". A protected disclosure may be made as part of an employee's job duties, may concern policy or individual misconduct, and may be oral or written and to any audience inside or outside the agency, *without restriction to time, place, motive, or context.* In 1989, Congress explicitly changed the language in section 2302(b)(8) from protecting "a" disclosure to protecting "any" disclosure, specifically to prohibit those type exceptions.

App. 58, 140 Cong. Rec. H11422 (daily ed. October 7, 1994) (statement of Mr. McCloskey) ("Floor Statement") (emphasis added).

This case illustrates precisely how adopting the subjective test opens a Pandora's Box of public policy mischief by allowing MSPB judges discretion to cancel protection for "any disclosure" through reading the whistleblower's mind. This is literally the opposite of Congressional intent. The concept of objective reasonableness being merely "secondary", as the agency argued to the Federal Circuit, is plainly repugnant to legislative policy and statutory language.

By any objective standards, the Petitioner-employee's disclosure evidenced a reasonable belief of, at minimum, the violation of Arizona appraisal laws and regulations by an appraiser hired by the DOJ, and perhaps by the DOJ local attorney who had done that hiring. Professional incompetence violates the professional responsibility laws of most state-licensed professions, yet the MSPB and Federal Circuit's subjective belief tests would place whistleblowers who want to report such incompetence at great peril. Congress wants to know when federal agencies are hiring and using professionals who may not meet the competency criteria of regulating state agencies. Congress does not insist that the whistleblower be right, so long as a reasonable person could conclude that laws or regulations have been violated. Where the competence of Mr. Englehorn has been strongly put at issue by the top appraisal reviewers of both the DOJ (Mr. Eaton) and the Bureau of Reclamation (Dr. Salazar), it is inconceivable that Congress could have intended that someone like the Petitioner-employee could still lose his job on the pretext of inquiry into his subjective motives. The Petitioner-employee's objectively reasonable beliefs have been well established.

D. Relationship of Whistleblower Protection Act to the Non-Existence of *Bivens* Private Right of Action Under First Amendment:

The case for liberally construing Whistleblower Protection Act cases is made stronger when understood in the context of the complete absence of any other remedies available to federal employees for violation of their free speech rights. In *Bush v. Lucas*, 462 US 367, 76 L Ed 2d

648, 103 S Ct 2404 (1983), this Court held that there is no *Bivens* constitutional damages remedy available to federal employees affected by the Civil Service Reform Act of 1978. Under *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 US 388 (1971), a remedy may be implied by the courts for constitutional violations where (1) Congress has not provided an "equally effective alternative remedy"; or (2) where "special factors" are present. The magnitude of Congressional involvement is at the core and principle of special factors analysis. The *Bush* Court described Congressional involvement and the statutory scheme as constituting such special factors, because the civil service system is:

> "[A]n elaborate, comprehensive scheme", 462 US at 385; * * * [that] "apply to a multitude of personnel decisions that are made daily by federal agencies"; * * * [as imbued with a] "history of the development of civil service remedies and the comprehensive nature of the remedies currently available"; * * * [and as] "an elaborate remedial system that has been constructed step by step, with careful consideration to conflicting policy considerations"; [id at 388].

Congress' intent with the Whistleblower Protection Act was to protect First Amendment rights, but the MSPB and the Federal Circuit have thwarted that intent:

> Unfortunately, while the Whistleblower Protection Act is the strongest *free speech law* that exists on paper, it has been a counterproductive disaster in practice. The WPA has created new reprisal victims at a far greater pace than it is protecting them.

House Report, *id.* at 12, emphasis added. Particularly because federal employee whistleblowers have no *Bivens* remedies, the courts should give full life to Congress' "remedial scheme", rather than filling it with loopholes and exceptions.

II. The Supreme Court Should Provide Guidance to the Federal Circuit in View of its "Monopoly" on Development of Case Law Implementing the Whistleblower Protection Act.

If it is a central rule of statutory construction that the courts should not frustrate legislative intent, but should give meaning to a statute's language, *Holly Farms Corp. v. NLRB*, 517 US ___, 134 L Ed 2d 593, 601, 116 S Ct 1396 (1996), then that rule is being broken by the Federal Circuit in this, and many other cases. No one can doubt Congress' frustration, as the House Report on the 1994 Amendments demonstrates. Because this legislative history is set forth in a discussion of a multi-year amendment process, it is entitled to special weight. *Bufferd v. Commissioner*, 506 US 523, 531, 122 L Ed 2d 306, 133 S Ct 927 (1993) ("the views of a Congress engaged in the amendment of existing law as to the intent behind that law are entitled to significant weight"); and *Loving v. United States*, 517 US ___, 135 L Ed 2d 36, 57, 116 S Ct 1737 (1996) ("subsequent legislation declaring the intent of an earlier statute is entitled to great weight in statutory construction." The House Report complained:

> However, the statistical record indicates that the MSPB and Federal Circuit Court of Appeals have not been favorable to Federal Whistleblowers. * * * Instead of restoring balance, the

> U.S. Court of Appeals *for the Federal Circuit has been more hostile than the Board.* Since its 1982 creation, in its reported decisions employees have prevailed only twice on the merits with the whistleblower defense. [Citing, *Sullivan v. Dept. of Navy,* 720 F.2d 1266 (Fed. Cir. 1983); *Marano v. Dept. of Justice,* 2 F.3d 1137 (Fed. Cir. 1993).] The committee received extensive testimony at hearings that the MSPB *and Federal Circuit have lost credibility with the practicing bar* for civil service cases.
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> * * *
>
> The body of case law developed by the Board and Federal Circuit has represented a steady attack on achieving the legislative *mandate* for effective whistleblower protection.

H.R. Rep. 103-769, 103d Cong., 2d Sess. 12 (1994) ("House Report"), p. 17 (emphasis added) (App. 54).

Indeed, the level of Congressional frustration with the Federal Circuit has been expressed strongly:

> The committee recognizes that realistically it is impossible to overturn destructive precedents as fast as they are issued by the MSPB or Federal Circuit.

Id. at p. 18 (App. 56). The legislative history lists a number of Federal Circuit decisions which are considered contrary to the Whistleblower Protection Act, which as of October 1994, were virtually all Federal Circuit Whistleblower Protection Act cases except for two. (*Id.*, at p. 17,

App. 54).[3] Although the Senate bill did not concur, the House bill took that body's frustration to the point of giving whistleblowers who are suspended for more than 14 days or removed from their jobs a civil jury trial for

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[3] All reported cases of the Federal Circuit since the 1994 Amendments have denied the whistleblowers the protections of the Act. *See, Caddell v. Department of Justice*, 96 F.3d 1367 (Fed. Cir. 1996) (1994 Amendment of the WPA restricting psychiatric testing of whistleblowers not retroactive, affirming MSPB); *Frederick v. Department of Justice*, 73 F.3d 349 (Fed. Cir. 1996) (WPA was enacted to protect employees who report genuine infractions of law, not to encourage employees to report arguably minor and inadvertent miscues occurring in conscientious carrying out of one's assigned duties, reversing MSPB); *Hartman v. Merit Systems Protection Bd.*, 77 F.3d 1378 (Fed. Cir. 1996) (Deputy clerk of U.S. District court who was employee of the court rather than administrative office of courts not protected by WPA, affirming MSPB); *Horton v. Department of Navy*, 66 F.3d 279 (Fed. Cir. 1995) (WPA does not protect disclosures made directly to persons about whose behavior whistleblower complained, affirming MSPB); *Mintzmyer v. Department of Interior*, 84 F.3d 419 (Fed. Cir. 1996) (resignation is presumed to be voluntary act and, therefore, beyond MSPB jurisdiction, affirming MSPB); *Serrao v. Merit Systems Protections Bd.*, 95 F.3d 1569 (Fed. Cir. 1996) (disclosures made during agency grievance procedure not protected) (Newman, J., dissenting that majority decided case sua suponte on an issue not relied upon by the MSPB or any party; disregarded rule that WPA protects disclosures, however made; and adds to "the loopholes that the Board and the courts have inserted into the statutes", affirming MSPB, *id.* at 1581); and *Watson v. Department of Justice*, 64 F.3d 1524 (Fed. Cir. 1995) (untimely disclosures protected by the WPA may be used as basis for disciplinary proceedings if the untimeliness violates agency policy, affirming MSPB).

damages as an alternative to the MSPB and the Federal Circuit:

> H.R. 2970 attempts to restore the balance to precedents interpreting the Whistleblower Protection Act by creating badly needed competition – a choice of fact-finding fora between existing remedies and *civil actions providing for jury trials* in U.S. District Court; and (2) *elimination of the Federal Circuit's monopoly* on judicial review of Board decisions by also permitting jurisdiction in the U.S. circuit court of appeals where a petitioner resides. The structural changes will provide whistleblowers with the same access to court enjoyed by citizens generally.

Id., emphasis added (App. 56).

The abolition of the Federal Circuit "monopoly" was intended, in part, to facilitate review by this Court. The House Report, *id.* at 20, explained:

> While acknowledging that the new structure established in H.R. 2970 will not be the most administratively convenient, the committee found that there will be expanded access to the appellate courts for the petitioner, the expanded jurisdiction will bring in panels with greater expertise in labor law, *and any disparities in appellate holdings* will ultimately strengthen the Federal whistleblower protection structure by focusing on disputed legal areas and thereby enabling Congress *or the Supreme Court to resolve the matter.*

Id., emphasis added (App. 57-58).

To date, this Court has not considered a petition for certiorari from a petitioner under the Whistleblower Protection Act.[4] The Federal Circuit retains a *sui generis* jurisdiction over Whistleblower Protection Act cases, thus precluding any conflict among the circuits from resulting in Supreme Court review. However, where only one circuit handles a specific subject matter, this itself makes certiorari appropriate. *See, Exhibit Supply Co. v. Ace Patents Corp.*, 315 US 126, 86 L Ed 736, 740 (1942) ("Although there is no conflict of decision, we were moved to grant the petition * * * with a showing that the industry affected by the patent is located in the seventh

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[4] This Court has considered several cases under the Civil Service Reform Act of 1978 more generally. *See, Cornelius v. Nutt*, 472 US 648, 86 L Ed 2d 515, 105 S Ct 2882 (1985) (procedural errors in federal employee disciplinary proceedings held not reversible error absent substantial prejudice to employee, reversing Federal Circuit); *Department of Navy v. Egan*, 484 US 518, 98 L Ed 2d 918, 108 S Ct 81 (1988) (MSPB held to lack statutory authority to review underlying reasons for denial of security clearance, where federal civilian employee lost his job for cause because of such denial, reversing Federal Circuit); *Karahalios v. Federal Employees*, 489 US 527, 103 L Ed 2d 539, 109 S Ct 1282 (1989) (federal employees, under Title VII of the Civil Service Reform Act, held not entitled to private cause of action against union for breach of duty of fair representation, affirming Federal Circuit); *Lindahl v. OPM*, 470 US 768, 84 L Ed 2d 674, 105 S Ct 1620 (1984) (MSPB judgment affirming denial of federal worker's disability retirement claim held reviewable in Federal Circuit for alleged errors of law or procedure, reversing Federal Circuit); and *United States v. Fausto*, 484 US 439, 98 L Ed 2d 830, 108 S Ct 668 (1988) (exclusion of nonveteran excepted service employees from review of adverse personnel decisions under Chapter 75 of Civil Service Reform Act of 1978 held to bar judicial review under Back Pay Act, reversing Federal Circuit).

circuit so that litigation in other circuits resulting in a conflict of decision would not be likely to occur.") This is a case which presents a need for this Court to exercise its "supervisory power" over a court of appeals. *See,* 17 Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d sec. 4035, pp. 8-9 ("review may be granted * * * to exercise supervisory power over the lower federal courts").

CONCLUSION

The petition for writ of certiorari should be granted, and the Federal Circuit decision should be reversed. The case should then be remanded to the MSPB for further proceedings.

Respectfully submitted,

THAD M. GUYER
Attorney for Petitioner

APPENDIX

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UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
DENVER FIELD OFFICE

ROBERT E. GRIJALVA, Appellant, v. DEPARTMENT OF THE INTERIOR, Agency.	DOCKET NUMBER DE-0752-95-0061-I-1 DATE: APR 21 1995

Thad M. Guyer, Esquire, T. M. Guyer & Friends, P.C., *Suzanne M. Dohrer*, Esquire, Haglund, Dohrer & Watts, Phoenix, Arizona, and *Thomas M. Divine*, Esquire, Government Accountability Project, Washington, D.C., for the appellant.

Robert Moeller, Esquire, and *Katherine Ott Verburg*, Esquire, Phoenix, Arizona, for the agency.

BEFORE

Antoinette C. Martinez
Administrative Judge

INITIAL DECISION

The appellant timely appealed the action of the agency removing him from his position of GM-13 Supervisory Appraiser. The action was effective October 14, 1994. This action is appealable to the Merit Systems Protection Board (Board). *See* 5 U.S.C.A. §§ 7511-7513 and 7701(a) (West 1980 and Supp. 1995).

The appellant requested a hearing. A hearing was held on February 2-3, 1995. For the reasons stated below, the agency action is AFFIRMED.

ANALYSIS AND FINDINGS

Background

The appellant was a Supervisory and Review Appraiser for the Phoenix Area Office, formerly called the Arizona Projects Office for the Bureau of Reclamation (Reclamation) of the Department of the Interior. He performed the duties of Review Appraiser for seven years (since August 17, 1987). He became the supervisor for Reclamation's appraisal functions in Arizona effective February 14, 1988. In these capacities, he was required to evaluate the performance of his subordinate appraisers, to advise, counsel, and discipline them regarding their compliance or noncompliance with appraisal laws, rules and regulations, and to formally review appraisals by providing comments and recommendations in accordance with appropriate appraisal rules, regulations and laws. In his capacities as supervisor and review appraiser, the appellant was also required to work closely with the appraisal community at large, work with appraisers and attorneys in other agencies, and deal effectively with land owners and the public in order to effectively carry out the land acquisition program for Reclamation in Arizona.

By memorandum dated February 11, 1994, the agency proposed to remove the appellant from his position for failure to properly coordinate disclosure of confidential and privileged information, repeated failure to follow instructions, failure to cooperate with the U.S. Attorney,

insubordination, misuse of Government resources, misrepresentation of facts, and impeding the efficiency of the Service. *See* Initial Appeal File at Tab 5, Agency File, Tab 4J.

Failure to properly coordinate disclosure of confidential and privileged information

Background re disclosure. In accomplishing its mission, in some instances, the agency acquires land from the State of Arizona through a Deed of Relinquishment (DOR). A DOR is provided for in the State of Arizona Enabling Act whereby the Secretary of the Interior may request that title to certain lands be transferred to the United States for Reclamation projects, and the United States agrees to replace these lands to the State through future land exchanges. DOR's are executed without payment and only transfer title and ownership to the land interests, not title or ownership to any improvements or third-party interests on the land. It is the agency's position that if such third-party interests exist on lands acquired by the United States under DOR, it is incumbent upon the United States to appraise these interests and make payment to the interest holder if the third-party interest is also to be acquired. *See* Initial Appeal File at Tab 4, Agency File Tab 1.

In November 1987, the United States accepted a DOR from the State of Arizona for certain lands needed for the construction of the New Waddell Dam and Reservoir. Subsequent to acceptance of this deed, the United States was also pursuing acquisition of title to the land interests and improvements of the Johnston property whose land

was situated within the take line for the New Waddell Reservoir. In February 1991, a land survey was conducted by Reclamation which revealed that certain improvements owned by the Johnstons did not lie on their land, and were in innocent trespass on lands previously acquired by the United States under the DOR referenced above.

Reclamation sought to opinion of the agency's Field Solicitor's Office with respect to the acquisition and payment for the improvements which were on the subject property. It was the Field Solicitor's opinion that the DOR accepted by the Government did not transfer ownership of the improvements to the United States. The United States had not paid the State of Arizona for the improvements since acquisition by DOR does not include any payment for the improvements and the State of Arizona claimed no interest in them. It was not known that the improvements were in trespass until February 1991, when a land survey was conducted. The Field Solicitor further determined that it would be a violation of the Johnstons' Fifth Amendment rights to not pay them for these improvements.

On March 16, 1993, Reclamation, through the Office of the United States Attorney with the Department of Justice, filed a Declaration of taking with the Arizona District Court and thereby acquired title to the land interests and improvements of the Johnstons. Condemnations actions, such as this, place the United States into litigation with the land owners, with the Department of Justice representing the Federal agency (in this case Reclamation). In preparation for trial, the Department of Justice routinely hires independent appraisers to conduct

appraisals and to serve as expert witnesses in court. As such, the appraiser's work must be independent and uninfluenced by other appraisals. As normal practice, the Department of Justice submits the contract appraiser's preliminary appraisal report to the client agency for their review and comments. Reviews and comments are also obtained from DOJ staff appraisers. The appraisal reviews are then evaluated by DOJ and a final determination is made as to the acceptability of the contract appraiser's report for trial purposes. If issues arise regarding the appraisal, a modified appraisal may be ordered by DOJ, or another appraiser may be hired as an expert witness, depending upon the circumstances.

In May 1993, in preparation for litigation, Sue Klein, the Assistant U.S. Attorney, DOJ, independently contracted with Con Englehorn, a private appraiser, to prepare an appraisal report estimating the fair market value of the Zane and Donna Johnston property (Johnston property). The appraisal was required for litigation in the condemnation action to acquire the Johnston property. The contract included possible testimony at trial as an expert witnesses regarding the appraisal.

Englehorn completed his appraisal report on August 20, 1993, and submitted it to Klein. Klein received the report on September 3, 1993, and forwarded it to Newman for Reclamation to initiate the customary formal review in preparation for litigation.

Newman received the report on September 6, 1993, and gave it to the appellant. On September 6, 1993, the appellant was asked to review the appraisal report as a "Date-of-Taking Appraisal" and to secure the review of

the Denver Office Chief Appraiser, John H. Salazar. The appellant was also asked to coordinate his comments with Klein to assist her in preparation for trial.

On October 27, 1993, the appellant filed a formal written referral with the Arizona State Board of Appraisal charging Englehorn with violation of an ethics provision, violation of specific appraisal standards, and possible violation of State law. The appellant's referral to the Board was based on Englehorn's appraisal report which the Assistant U.S. Attorney hired him to produce as an expert witness for the United States. On November 1, 1993, the appellant's supervisor, John Newman, received a call from Klein wanting to know why Reclamation had filed a complaint against the U.S. Attorney's expert witness.

Failure to coordinate disclosure The agency charges that the referral (complaint) filed by the appellant with the Arizona Board of Appraisal (Arizona Board) on October 27, 1993, against Con Englehorn without coordination with either Sue Klein, the Assistant U.S. Attorney or the agency was in violation of the Uniform Appraisal Standards for Federal Land Acquisitions. The agency states that as review appraiser, the appellant is fully aware that the Uniform Appraisal Standards for Federal Land Acquisitions require that appraisal reports and agency reviews of such reports are to be treated as confidential information during litigation. The agency charges that even though the appellant maintained that he did not furnish a copy of the actual appraisal report or the Denver Office's review comments to the Arizona Board of

Appraisal, the data and narrative information the appellant provided was based on the two documents. In addition, the appellant's access to these documents arises solely from his position as review appraiser for the Arizona Projects Office. The agency states that the appellant's use and disclosure of this information without proper coordination severely prejudiced the agency's credibility and standing with the U.S. Attorney's Office, interfered with the prosecution of this case and severely undermined the U.S. Attorney's chances of success at trial not only in this case, but in two others. Further, it embarrassed Newman and the agency, discredited the Government's expert witness, resulted in the loss of approximately three to four months of the U.S. Attorney's trial preparation time, and it forced the Assistant U.S. Attorney to not use this witness in at least two other condemnation cases that were then in litigation. The Assistant U.S. Attorney was required to recontract for expert witness services and new appraisal reports at a cost to Reclamation of approximately $5,000.00.

Sue Klein testified that the disclosure of the information contained in the Englehorn appraisal report was not coordinated with her, i.e., she heard about the disclosure from Englehorn who told her that a complaint had been filed against him at the state appraisal Board based upon the Zane Johnston appraisal. *See* testimony of Sue Klein, Hearing Transcript (hereinafter HT) at pp. 221-22. Klein also testified that Reclamation was required to pay for a reappraisal of the Johnston property. *Id.* at 210. She also informed Newman that not only the Zane Johnston case but two other cases that she had hired Englehorn to work on were in jeopardy, and she was going to have to hire

someone else to do those appraisals for her and that she felt that Reclamation should pay for the appraisals. *See* testimony of Sue Klein, HT at pp. 224-25. She also testified that in discussing the complaint against Englehorn with Newman, she informed Newman that having a complaint filed against an expert witness she was using jeopardized the litigation because it jeopardized the witness' credibility. Klein also testified that as a result of the appellant's disclosure, the agency lost credibility with the Department of Justice. *Id.* at 226.

John Newman, the appellant's supervisor, testified that the appellant did not coordinate the disclosure with him or any other agency official. *See* testimony of John Newman, HT at pp. 99-106. He also testified that the appellant's actions embarrassed him and the agency. *Id.*

The appellant admits filing a referral with the Arizona Board of Appraisal on October 27, 1993. The referral was in reference to the appraisal submitted by Englehorn in the pursuit of his duties as a contract appraiser and expert witness for the DOJ. The appellant further stipulates that Englehorn completed his appraisal report and submitted it to Klein. Klein received the report and gave it to Newman for Reclamation to initiate a review in preparation for litigation. The appraisal regarded land which was the subject of a condemnation action being pursued by Klein on behalf of the United States. *See* Initial Appeal File at Tab 19 (parties' agreed upon material facts). The appellant also admitted that he did not coordinate the disclosure with anyone. *See* testimony of the appellant, HT at 628-29. The appellant testified that he did not believe he was prohibited from disclosing the information because he was not the appraiser filing the

appraisal report to be used by the U.S. Attorney. *Id.* at 629. Further, the appellant testified that he was required to make the disclosure under the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. 101-73, 12 U.S.C. § 3301 et. seq.

It is uncontradicted that the agency has adopted the Uniform Appraisal Standards for Federal Land Acquisitions in conducting its real estate transactions. The Uniform Appraisal Standards for Federal Land Acquisitions provide, in pertinent part, regarding the confidential nature of appraisals, that appraisers' valuations and supporting appraisal reports are confidential information and the appraiser shall not divulge his or her findings and opinions to anyone except authorized officials of the government. Once an eminent domain action has been filed, authorization for disclosure must be in writing from the government's legal counsel assigned to the case. Any appraisal report prepared for the purpose of government acquisition should be construed to be the subject of potential litigation until such time as the government has consummated its acquisition. The Department of Justice strongly recommends that agencies not disclose the contents of the appraisal reports beyond that required by PUB. L. 91-646 during the negotiation process. The standards provide that *"[a]gencies shall not divulge the contents of an appraisal report to anyone, without authorization from the Department of Justice, once a case has been referred to the department for the filing of a condemnation action."* (Emphasis added). *See* Initial Appeal File at Tab 6, Agency File, Tab 4K(2), pp. 93-94. In addition, the prohibition against disclosure during pendency of litigation without written authorization from the government's

legal counsel extends to professional peer review committees and to state and local appraiser licensing and/or certifying agencies. This policy is considered a "jurisdictional exception" to the Uniform Standards of Professional Practice. *Id. See also* 12 U.S.C. § 3339, et. seq. (agencies are required to adopt uniform appraisal standards for conducting real estate transactions).

Because the agency has adopted the Uniform Standards for Land Acquisitions, I find that the appellant was prohibited from disclosing the information contained in the Englehorn appraisal of the Johnston property without prior approval of the Assistant U.S. Attorney who was litigating the condemnation case regarding the property for Reclamation. Based upon the appellant's admission that he did not coordinate the disclosure of the information with the Assistant U.S. Attorney assigned to the Johnston case and that he did not seek or get her approval to make the disclosure, I find that this charge is sustained. I note that in addition to prohibiting the appraiser from disclosing the information contained in the appraisal report, the standards specifically state that agencies shall not divulge the contents of an appraisal report to anyone, without authorization from the Department of Justice, once a case has been referred to the department for the filing of a condemnation action. I find that the appellant obtained the information as a member of the agency and, thus, any disclosure must have been made on its behalf. Thus, based upon the appellant's extensive knowledge of the various rules and regulations related to appraiser requirements and prohibitions, I find that the appellant's testimony that he was not prohibited from making the disclosure is inherently incredible, i.e.,

the prohibition against disclosure applies not only to appraisers but also to agencies and the appellant has worked as a review appraiser for the agency for at least seven years. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458-462 (1987).[1] Accordingly, I find that the agency has shown by a preponderance of the evidence that the appellant disclosed appraisal information without proper coordination. I will address the appellant's affirmative defense that he was required under FIRREA to report the information infra.

The agency also charges that the appellant's use and disclosure of the Englehorn appraisal severely prejudiced the agency's credibility and standing with the U.S. Attorney's office, interfered with the prosecution of this case and severely undermined the U.S. Attorney's chances of success at trial not only in this case, but in two others. The agency further states that the appellant's action embarrassed his supervisor and the agency, discredited the Government's expert witness, resulted in the loss of approximately three to four months of the Assistant U.S. Attorney's trial preparation time, and it forced the Assistant U.S. Attorney to not use Englehorn in at least two other condemnation cases that were in litigation at the

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[1] In *Hillen*, the Board outlines factors to be considered in making and explaining credibility determinations. Factors to be considered are: (1) The witness's opportunity and capacity to observe the event or act in question; (2) the witness's character; (3) any prior inconsistent statement by the witness; (4) a witness's bias, or lack of bias; (5) the contradiction of the witness's version of events by other evidence or its consistency with other evidence; (6) the inherent improbability of the witness's version of events; and (7) the witness's demeanor.

time. The agency also states that the U.S. Attorney was required to recontract for expert witness services and new appraisal reports at a cost to Reclamation of approximately $5,000.00.

With respect to this part of this charge, Sue Klein testified that the agency's credibility and standing was prejudiced by the appellant's referral. She also testified that the referral resulted in the need to hire a different appraiser for the Johnston case and two other cases for which she had scheduled Englehorn as an expert witness. *See* testimony of Sue Klein, HT at pp. 224, 226. She requested that Reclamation pay for the second appraisals. *See* testimony of Sue Klein, HT at pp. 210, 224. Klein also testified that the appellant's disclosure jeopardized the litigation because it jeopardized the witness's credibility. She further testified that not only the Johnston case was jeopardized, but the litigation in two other cases for which she had hired Englehorn as an expert witness were also placed in jeopardy. Klein also confirmed the fact that the agency was required to pay for reappraising the three properties. *Id.* at 224-26.

I find that Klein's testimony is uncontradicted. In addition, I find that the record supports Klein's testimony that it was necessary to contract for reappraising the properties. *See* Initial Appeal File at Tab 6, Agency File, Tabs 4K(7) and 4K(12). Thus, I find that this specification is sustained. *See Hillen*, 35 M.S.P.R. at 460.

Repeated Failure to Follow Instructions and Failure to Cooperate with the U.S. Attorney

The agency next charges that the appellant failed to follow his first and second line supervisors' verbal or written instructions to him regarding proper coordination of his work on three separate occasions.

Failure to follow second-line supervisors' instructions

The agency first states that sometime during late February or early March 1993, Dennis E. Schroeder (the appellant's second line supervisor), Project Manager, Arizona Projects Office, gave the appellant instructions to review a January 19, 1993 informal valuation report from the firm of Johnson & Zaddack, Inc., regarding the Lake Pleasant project and to provide an informal assessment to him. Instead of providing the informal review to Schroeder, the appellant authored and signed a formal review and letter dated March 10, 1993, forwarding the formal review to the Assistant U.S. Attorney.

Schroeder testified that Reclamation and Maricopa County both had an interest in Lake Pleasant, the former as a water resource, the latter as a recreation area. Schroeder testified that a Maricopa County official, Roy Pederson, asked Schroeder if he would look at a valuation of the property in question and comment on the valuation informally. Schroeder also testified that the information was not conveyed as a formal valuation or formal appraisal of the property in question and that the appellant was aware of this fact. Schroeder asked the appellant to review the valuation and to provide Schroeder with informal comments regarding the document. Instead, the

appellant authored and signed a formal review and letter dated March 10, 1993, to the U.S. Attorney. Contrary to instructions and to information provided to the appellant, the appellant's review treated the document received from Pederson as a formal valuation and/or appraisal of the Maricopa County property. Schroeder testified that the appellant was aware that the documents he was reviewing were neither formal valuation or appraisal documents. *See* testimony of Dennis Schroeder, HT at pp. 286-88, 327-34.

The appellant testified that, as an appraiser filing a formal review of an appraisal or valuation, he was required by appraiser policies and law to file a formal review and to certify his findings. *See* testimony of the appellant, HT at pp. 597-602.

Upon review of Schroeder's testimony, I find that the agency has sustained its charge that the appellant failed to follow Schroeder's instructions to provide an informal review report regarding the Maricopa County property. I find that Schroeder's testimony that the information provided by Pederson was not a formal valuation and that the appellant was aware of this fact is supported by the appellant's transmittal to the U.S. Attorney, Klein, in which he states that the report *"is not an appraisal and should not be treated or used as one."* (Emphasis added). *See* Initial Appeal File at Tab 4, Agency File, Tab 4E(13). Thus, I find it inherently incredible that the appellant was prohibited from providing an informal review without certification to his supervisor. Further, based upon the appellant's experience as a supervisor and an appraiser, I find it inherently incredible that the appellant did not understand Schroeder's instructions that the comments

were to be provided informally in view of Schroeder's clear instructions that the comments were to be provided informally. *See Hillen*, 35 M.S.P.R. at 461; see also testimony of Dennis Schroeder, HT at pp. 286-88, 327-34. Thus, this part of the specification is sustained.

The agency next charges that the appellant failed to provide the U.S. Attorney's office with information the Assistant U.S. Attorney requested for the New Waddell area for the Pleasant Country Limited condemnation case. The agency states that during May 1993, Klein asked the appellant to provide copies of comparable sales data in the New Waddell area for the Pleasant Country Limited condemnation case, also in litigation. On several occasions, the appellant challenged her need for this information by telling her it would take too much time to produce and would not be useful to her anyway. Newman intervened on Klein's behalf and told the appellant to cooperate with her requests for information and give her what she wanted. During this same time, Klein requested other information from the appellant regarding the Johnston case.

On June 7, 1993, the appellant authored and signed a letter to Klein challenging her handling of the Johnston case and implying that Klein might divulge confidential data to inappropriate persons. The letter did not provide Klein with any of the information she requested, and stated that the appellant wanted to know what she was going to do with the data and who would be seeing it before he turned the work over to her. Newman met with the appellant on June 10, 1993, and informed him that Newman considered the appellant's June 7, 1993 letter to be offensive, inflammatory, and an embarrassment to

Reclamation. Further, the letter did not comply with Newman's instructions to give Klein what she wanted. Newman also informed the appellant that the letter was clearly outside his authority to sign and was not routed through Newman as required by Newman's September 11, 1991 delegation of authority memorandum.

In support of this charge, the agency filed the June 7, 1993 memorandum in question. In the memorandum, the appellant states that he is concerned about who will see the confidential data and where it will end up. The appellant then requests that Klein tell him who will have access to the data before he will provide the information. *See* Initial Appeal File at Tab 7, Agency File, Tab 4K(24).

Klein also testified that in May 1993 (sic), she asked the appellant for information regarding sales with analysis in the New Waddell area. She testified that he provided some raw data regarding sales. Because she also needed analysis regarding the data, she made a second request. Approximately a year later [June 1993], she received a letter from the appellant informing her that he had compiled the information but was not going to give it to her. *See* testimony of Sue Klein, HT at pp. 230.

Newman testified that he viewed the June 7, 1993 letter as disrespectful. He also testified that it was outside the appellant's authority to refuse or decline to provide assistance [to the U.S. Attorney] without Newman's approval. He testified that he met with the Department of Justice officials following Klein's receipt of the letter and Klein expressed to Newman her frustration at trying to obtain the information from Reclamation over several

months and being unable to do so. *See* testimony of John Newman, HT at pp. 121-27.

The agency also provided various copies of correspondence regarding the U.S. Attorney's request for comparable sales data in the New Waddell area for the Pleasant Country Limited condemnation case. In a letter to Don Strouse, a DOJ attorney working with Klein, the appellant acknowledges that DOJ requested analysis of sales data as early as January 30, 1992. *See* Initial Appeal File at Tab 5, Agency File, Tab 4E(19). In that letter, the appellant informs Strouse that all of the information as requested is not available. In a February 6, 1992 electronic mail message to the appellant from Stanley F. Seigal, Realty Officer, Seigal informs the appellant that the DOJ wanted sales data in the same format as that provided by two contract appraisers to the DOJ. *Id.* at Tab 4E(17). In a February 6, 1992 memorandum from the appellant to Seigal, the appellant refuses to provide analysis saying it was not necessary for the litigation, and he refused to change the format. *Id.* at Tab 4E(17).

The appellant testified that in February or March 1992, a meeting was held with Reclamation officials and DOJ attorneys. In that meeting, DOJ was provided raw sales data for the Lake Pleasant Limited condemnation action. *See* testimony of the appellant, HT at p. 533. Appellant testified that several weeks later, Strouse and Klein requested that he give them all the sales information he had north of Lake Pleasant. The appellant questioned the request because he considered 10 or 20 sales would have been comparable and useful to any appraisal or any condemnation action. *Id.* at 534-35. The appellant

also testified that he attempted to provide the information requested by Klein and Strouse approximately six times, but they continually changed the requirements of the content of the data they were requesting. *Id.* at 548-50. The appellant also maintains that he did not refuse to provide data. *Id.* at 550.

I find that the agency has established its charge that the appellant failed to cooperate with the U.S. Attorney's office in providing information for the New Waddell area where the DOJ was representing Reclamation in a condemnation case. Contrary to the appellant's claim that he never refused to provide information, the appellant's June 7, 1993 letter to Klein clearly states that he will not provide the data she requested unless he is told of the intended disposition and use of the data. *See* Initial Appeal File at Tab 7, Agency File, Tab 4K(24). Further, it is clear from the record that the intended use of the data requested by the DOJ was for litigation purposes in the Lake Pleasant Limited condemnation action. *See* testimony of the appellant, HT at 533. I further find the appellant's testimony that Klein and Strouse did not make clear the exact nature of the data they were requesting is contradicted by his correspondence to Seigal in which the appellant refuses to provide the information in the format requested by Klein and Strouse. *See* Initial Appeal File at Tab 5, Agency File, Tab 4E17; *Hillen*, 35 M.S.P.R. at 460. Accordingly, I find that the agency has shown that the appellant failed to cooperate with the U.S. Attorney's office in providing information for the New Waddell area.

The agency also charges that the appellant failed to coordinate his comments regarding the Johnston property

appraisal with Klein as instructed by his supervisor, Newman.

As discussed above, the appellant admits that he did not coordinate his comments regarding the Johnston property appraisal with Klein. Thus, I find that this charge is sustained.

Insubordination

The agency next charges that on November 30, 1993, Newman temporarily suspended the appellant's delegated authority to sign correspondence and restricted him from exercising his delegated authority to review and approve appraisal reports. By letters dated December 4, 1993, to Newman and Dennis Schroeder, the appellant informed his supervisor and second level supervisor that he would not comply with the November 30, 1993 memorandum, and questioned Newman's authority to take such an action. On December 13, 1993, Newman again met with the appellant and presented him with a memorandum reaffirming his November 30, 1993 memorandum temporarily suspending the appellant's authority to sign correspondence and restricting the appellant's exercise of Review Appraiser authority. In spite of the November 30, 1993, and December 13, 1993 memorandums, the appellant exercised approval authority and officially reviewed and approved an appraisal report on December 13, 1993. In addition, on January 21, 1994, the appellant again signed a letter to the Chief Realty Division.

The agency filed copies of the memorandums temporarily suspending the appellant's delegated authority. *See*

Initial Appeal File at Tab 6, Agency File, Tabs 4K(9) and (13). The agency also filed copies of the appellant's letters to his supervisors. *Id.* at Tabs 4K(10) and (11). In addition, the agency provided a copy of the appraisal review signed by the appellant on December 13, 1993, and the correspondence to Seigal signed by the appellant on January 21, 1994, in violation of Newman's instructions restricting the appellant's authority to sign such correspondence. *Id.* at Tabs 4K(6) and (8).

The appellant admits exercising each of his delegated authorities once soon after each authority was suspended. *See* Initial Appeal File at Tab 32, Appellant's closing statement. However, the appellant appeared to renew his allegation that Newman was without authority to suspend his appraisal review authority because the delegation had come from John Salazar, the agency's Chief Appraiser in Denver.

I agree with the agency that the appellant's argument that Newman was without authority to suspend his review authority is without merit. The uncontradicted evidence is that John Newman was the appellant's first line supervisor. As such, Newman was responsible for the appellant's day-to-day assignments. Thus, I find that it was within Newman's authority to restrict the appellant's work activity. In addition, based upon the appellant's admission that he authored the documents contrary to his supervisor's instructions, I find that this charge is sustained. *See,* e.g., 5 C.F.R. § 1201.63 (a stipulation will satisfy a party's burden of proving the fact alleged).

I note also that the appellant argues that the suspension of his delegated authorities was a direct result of his

whistleblowing activities. This contention will be discussed *infra*.

Misuse of Government Resources, Misrepresentation of Facts and Impeding the Efficiency of the Service

The agency next charges that the appellant misused Government resources when he ordered one of his employees to perform an appraisal for which the National Park Service (NPS) had assumed responsibility. The agency also charges that the appellant misrepresented to his supervisor that an agreement had been made that Reclamation would perform the appraisal. Finally, the agency charges that the appellant's duplication of the appraisal interfered with the conduct of efficient Government business.

On April 21, 1992, the appellant attended a meeting with Reclamation representatives and representatives of the NPS regarding a proposal to exchange certain parcels of land under the jurisdiction of Reclamation for a private parcel called the Rocking K Ranch which would be used to expand Saguaro National Monument. *See* testimony of Stanley Seigal, HT at pp. 32-36. The meeting was arranged to discuss the respective responsibilities of the NPS and Reclamation in effecting the exchange. *Id.* at 36-38. Seigal testified that the NPS possessed the legal authority to effect the exchange, not Reclamation. *Id.* at 39.

Seigal further testified that during the meeting, an agreement was reached that the NPS would obtain an appraisal by Alfred (Al) Benson to appraise the Rocking K Ranch parcel, and Reclamation appraisal personnel

would appraise the property under the jurisdiction of Reclamation, located at Scottsdale and Bell Roads. *See* testimony of Stanley Seigal, HT at pp. 38-43. Seigal prepared a memorandum documenting the agreement and distributed a copy to pertinent offices including the appraisal branch headed by the appellant. *Id.* at 42-43. Seigal further testified that he was not contacted by the appellant regarding any disagreement or discrepancy in the agreement as set forth by Seigal. *Id.* at 43. *See also* Initial Appeal File at Tab 7, Agency File, Tab 4K(29).

Edward Haberlin, Chief of the Division of Land Resources for the western region of the NPS at the time of the April 21, 1992 meeting, corroborated Seigal's testimony. Haberlin testified that prior to the April 21, 1992 meeting, NPS had contracted with Al Benson, an Arizona licensed appraiser, to appraise the Rocking K Ranch property. Thus, it was agreed that Reclamation would appraise its own Central Arizona Project property. *See* testimony of Edward Haberlin, HT at pp. 447-48. Haberlin further testified that he was surprised to hear that Reclamation had conducted an appraisal of the Rocking K Ranch because it was not his understanding that Reclamation would do an appraisal of the Rocking K Ranch property. *Id.* at 448. Haberlin then had two appraisals for the same property. The two appraisals would have presented a problem because they had different values. However, he (NPS) decided that the Al Benson appraisal would be used because Reclamation had failed to follow the Uniform Relocation, Assistance and Land Acquisition Procedures Act in performing the appraisal. He testified that Reclamation had not informed the land owner of its

intent to do an appraisal, and the appraisal was not authorized by the owner as required. *Id.* at 448-49.

Patricia Stolz, one of the appellant's subordinate appraisers at the time of this action, testified that she attended the April 21, 1992 meeting as an observer. She also testified that it was her understanding that Reclamation would appraise both the offered (Rocking K Ranch) and selected (Reclamation) property because it was normal procedure for Reclamation to do so. *See* testimony of Patricia Stolz, HT at pp. 495-97.

The appellant testified that he attended the April 21, 1992 meeting with NPS and other Reclamation officials. The appellant corroborated Haberlin's testimony that the NPS had contracted with Al Benson to appraise the Rocking K Ranch property, i.e., the appellant testified that he was informed at the April 21 meeting that NPS had already contracted with Benson to do the Rocking K Ranch appraisal. *See* testimony of the appellant, HT 559-60. He testified, however, that when Reclamation agreed to appraise the "exchange property," it was his understanding that Reclamation would appraise both the Rocking K Ranch property and the Reclamation property to be given in exchange. He further testified that he made a decision to do the appraisal on the Rocking K Ranch without contacting the owner because contacting the busy landowner was time-consuming, and he did not have much time to complete the work. *Id.* The appellant also testified that the law, the Uniform Policy on Real Property Acquisition Practices, only requires that the owner be contacted if it is practicable. In this case, the appellant determined it was not practicable because he had a short time frame to complete the work. He also

concluded that he had all of the information he needed from the landowner because it had been furnished to him by NPS. *Id.* at 561-63. In addition, the appellant claims that his reference to the "appraisals" in his status reports regarding the exchange property and his statement to Newman that he (the appellant) was going to have Norman Edwards, a staff appraiser, devote all of his time to "the exchange properties" for the NPS, should have put the agency on notice that his staff was performing appraisals on both properties. *Id.* at 558-59, 564. *See also* Initial Appeal File at Tab 5, Agency File, Tab 4E(38)-(40). Finally, the appellant admits assigning one of his staff appraisers and using a helicopter to complete the Rocking K Ranch appraisal. *See* testimony of the appellant, HT at 569.

Upon review of the memorandum of agreement sent by Seigal to NPS and the testimony of Seigal, Haberlin, and the appellant, I find that the agency has established that Reclamation entered into an agreement that NPS would contract for an appraisal of the Rocking K Ranch, the land to be acquired by NPS, and Reclamation would appraise the land that Reclamation would provide for the exchange of the property. I find that the appellant's testimony that it was his understanding that his branch would perform the appraisal for the two properties is inherently incredible. The appellant admits that he was informed by NPS at the April 21 meeting that NPS had already hired Benson to appraise the Rocking K Ranch. *See* testimony of the appellant, HT at 559. Further, the appellant offers no plausible reason as to why he felt Reclamation would also appraise the property other than to say that it was normal procedure for his branch to

appraise both properties when Reclamation was exchanging properties. While this may have been true of property for which Reclamation had the authorization for exchanging, in this case, the uncontradicted evidence is that NPS was in charge of the instant exchange and NPS informed the appellant and Reclamation that it had hired Benson to conduct the Rocking K Ranch appraisal. Further, based upon the appellant's testimony of his familiarity with the law regarding land acquisition by the government and his extensive experience in the area, I find that the appellant's testimony that he believed he did not have to contact the landowner because his time constraints in performing the appraisal made the contact impracticable is inherently incredible. I am not persuaded that, based upon the appellant's experience, he believes that the requirement that the owner be contacted may be waived based on the constraints of the agency. *See*, e.g., *Webster's Ninth New Collegiate Dictionary*, impracticable is defined as: not practicable; incapable of being performed or accomplished by the means employed or at command. While the owner of the Rocking K Ranch may have been busy, there is no evidence that the appellant or Edwards would not be able to contact him to gain his approval for conducting the appraisal. Thus, not only did the appellant order Edwards to conduct an appraisal of the Rocking K Ranch contrary to Reclamation's agreement with NPS, but his instructions to Edwards not to contact the owner in conducting the appraisal rendered the appraisal useless because it was contrary to Federal land acquisition law. *See* testimony of Edward Haberlin, HT 448-49. *See also* Initial Appeal File at Tab 5, Agency File, Tab 4E(8).

Accordingly, I find that the unauthorized appraisal involved a misuse of government resources, i.e., at a minimum, the unauthorized appraisal involved the misuse of Edwards' time and the improper use of a helicopter for the purpose of preparing the appraisal. I also find that the agency has established by a preponderance of the evidence that the duplication of the effort and expenses involved in performing and reviewing the two appraisals for the same property, and the need for the staff from Reclamation and the NPS to discuss and deal with the unauthorized appraisal, necessarily impeded the efficiency of the service. *See* testimony of Dennis Schroeder, HT at p. 304. Accordingly, this charge is sustained.

Affirmative defenses

Latches. The appellant argues that the charge of misuse of government resources with respect to the NPS land exchange is stale. He states that the incident occurred in 1992 and no action was taken against him at that time.

With respect to this contention, Seigal testified that he did not learn that the appellant had caused Edwards to appraise the Rocking K Ranch property until November of 1992 when the appraisal was sent to Salazar for review. *See* testimony of Stanley Seigal, HT at pp. 43-44. Haberlin requested that Seigal prevent the appraisal from reaching final approval by Reclamation. *Id.* at 45.

Newman testified that he learned in the spring of 1992 that an appraisal was being done, but did not realize there was a problem regarding its authorization until late 1993 or early 1994. *See* testimony of John Newman, HT at

pp. 130-32. Newman did not recollect seeing the documentation regarding the agreement reached in the April 21 meeting between Reclamation and the NPS. *Id.* at pp. 130, 135-37. He also testified that the appellant never advised him that his recollection of what transpired at the meeting disagreed with that documented by Seigal. *Id.* at 136. He testified that the appellant was not completely open with him about the substance of the April 21 meeting or that Edwards' appraisal was contrary to the agreement reached by Reclamation and NPS. Newman did recollect being called into a meeting by Schroeder in March 1993 regarding a request from Seigal to Salazar that the unauthorized Edward's appraisal not be approved. *Id.* at 133-34.

A charge may be dismissed if the agency's delay in proposing adverse action is unreasonable and if this delay prejudiced the employee's ability to defend against the charge. *See Holland v. Department of the Air Force*, 56 M.S.P.R. 592, 597 (1993). In this case, Newman testified that he was aware that the appellant was conducting the two appraisals, but he did not become aware that there was a problem with the appellant's actions or that they were contrary to the agency's agreement with the NPS until late 1993 or early 1994. *See* testimony of John Newman, HT at pp. 130-32. Thus, I find that the delay in bringing charges against the appellant was not unreasonable. Moreover, the appellant was able to fully respond to this charge. Thus, I find that the appellant has not shown that he was prejudiced by the lateness of the charge. *See Jorgensen v. United States Postal Service*, 42 M.S.P.R. 442, 445 (1989) (employee must show prejudice to his rights or

to his ability to defend himself against the charge as a result of the agency's delay).

Whistleblowing activities. The appellant contends that his disclosure of the confidential information to the Arizona Board of Appraisal was protected under the Whistleblower Protection Act as amended. *See* 5 U.S.C.A. § 2302(b)(8) (West Supp. 1995). The disclosure was in the format of a "referral" of professional misconduct by a licensed private appraiser, Con Englehorn, in connection with the contract services Englehorn was providing to the DOJ in condemnation litigation. In the referral, the appellant alleged:

> This date of taking report will be used in a condemnation action in Federal Court. It will be the basis for Mr. Con Englehorn's testimony in court. The appraisal report is and will be misleading to third parties, i.e., judge and jury.

See Initial Appeal File at Tab 7, Agency File, Tab 4K(15), p. 6.

The appellant claims that the rationale for his allegation was that the Englehorn appraisal included in its valuation the worth of several "off-site" structures which were not disclosed as being situated off the parcels legally described in the condemnation complaint filed by Klein. The appellant concluded that this "misleading" aspect of the appraisal would result in taxpayers paying higher value for the property than warranted by the appraisal itself, or through a mechanism (condemnation) not provided by law.

In his response to Newman's request for a copy of the referral and in the referral, the appellant suggests that

there was a question of whether the fact or process of securing the appraisal may have been tainted by improper influence, i.e., the appellant claims there may have been a violation of A.B.S. § 32-3633. On page 8 of the referral, the appellant states:

> Given the number of times this parcel was appraised, I find it difficult to believe that Mr. Englehorn was not informed the improvements were off the subject property, and cannot believe that it was accidental that he valued them as part of the real estate. I am more inclined to believe that it was a willful attempt by someone else to influence the appraiser to arrive at a higher value by including the improvements.

See Initial Appeal File at Tab 7, Agency File, Tab 4K(15), p. 8.

The agency argues that the appellant could not have had a reasonable belief that his disclosure evidenced a violation of law. Citing *Haley v. Department of the Treasury*, 977 F.2d 553, 557 (Fed. Cir. 1992), *cert. denied*, 113 S.Ct. 2440 (1993) and *Dean v. Department of the Army*, 57 M.S.P.R. 296, 302 (1993), the agency argues that the appellant cannot meet the reasonable belief test established by the Court and Board in these cases.

Pursuant to 5 U.S.C. § 2302(b)(8), any employee who has the authority to take or direct others to take, recommend or approve any personnel action shall not with respect to such authority:

> (8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or application for employment because of –

> (A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences –
>
> (i) a violation of any law, rule, or regulation or
>
> (ii) gross management, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health
>
> if such disclosure is not specifically prohibited by law and if such information is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; . . .

The Arizona statute that the appellant claims that the agency or the DOJ officials violated, A.B.S. Section 32-3633, provides as follows:

> A person who induces or influences the actions of an appraiser for *purposes of securing an appraisal that is grossly misleading, or fraudulent,* is guilty of a class 6 felony. (Emphasis added).

In this case, the appellant claims that the fact that Englehorn included the off-site improvements as a part of the appraisal value of the Johnston property meant that someone, either Klein with DOJ, or an agency official, intentionally did not tell Englehorn that the improvements were off the property, which would have been a felonious act. *See* testimony of the appellant, HT at p. 586.

I find that the appellant could not have reasonably believed that either an agency official or a DOJ official had committed a felony. I note that the appellant testified that an agency staff appraiser had previously conducted

an appraisal of the property. Because it was unclear where the improvements were located, the staff appraiser, Dave Mahoney, was provided with a survey of the property and he valued the property without the improvements. *Id.* at pp. 571-73. In addition, the appellant had previously hired an outside appraiser, Iver Johnson, to conduct an appraisal of the same property. With respect to Johnson's appraisal, the appellant testified:

> Q (by Suzanne Dohrer) Did Iver Johnson also include the off-site improvements in his valuation?
>
> A Even though I had directed Iver Johnson and given him a copy of the map, he included the improvements . . .

See testimony of the appellant, HT p. 585.

I note that there is no evidence that the appellant filed a referral against Iver Johnson for providing an appraisal of the Johnston property that included the off-site improvements. Nor did the appellant consider himself culpable or guilty of a felony, as the person requesting the appraisal, because the Johnson appraisal included the off-site improvements when there was sufficient information at the time of the Johnson appraisal to show that the improvements included in the appraisal were off site.

In sum, based upon the appellant's extensive appraisal experience, I find that he did not have a reasonable belief that Englehorn's appraisal of the Johnston property constituted a violation of A.B.S. § 32-3633. *See Haley*, 977 F.2d at 557. As discussed previously, the appellant's own appraisal contractor, Iver Johnson, made a

similar error. *See* testimony of the appellant, HT at p. 585. Moreover, I find the appellant's referral does not contain a disclosure of a crime. *See Horton v. Department of the Navy*, 60 M.S.P.R. 397, 402 (1994) (to disclose is to expose, make known, lay bare or reveal). To the contrary, the appellant admits that he had no evidence of a crime. *See* testimony of the appellant, HT 650. Further, the appellant's speculation that there may be a possible violation of A.B.S. § 32-3633 does not constitute a protected disclosure. *See Sobczak v. Environmental Protection Agency*, 64 M.S.P.R. 118, 122 (1994) (unsupported speculation does not constitute specific and detailed disclosures protected by 5 U.S.C. § 2302(b)(8) (citation omitted).

The appellant also appears to allege that the action was taken in retaliation for his filing a complaint under the FIRREA, 12 U.S.C. § 3348(c). The appellant argues that as a professional appraiser it was his duty to report Englehorn's appraisal of the Johnston property to the Arizona Board of Appraisal because he questioned Englehorn's competency based upon Englehorn's inclusion of the off-site improvements in his appraisal of the Johnston property.

Upon review of the FIRREA,[2] it appears that the purpose of the sections applicable to appraisers is to

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[2] The FIRREA provides, in pertinent part, with respect to its purpose, 12 U.S.C. § 3301, and the requirement of reports to State certifying and licensing agencies, 12 U.S.C. § 3348(c) as follows:

12 U.S.C. § 3301. Declaration of purpose

It is the purpose of this chapter to establish a Financial Institutions Examination Council which shall prescribe uniform principles and standards for

provide that Federal financial and public police interests in real-estate-related transactions be protected by requiring that real estate appraisals utilized in connection with federally related transactions are performed in writing, in accordance with uniform standards, by individuals whose competency has been demonstrated and whose professional conduct will be subject to effective supervision, i.e., appraisers must be either state certified when required or, at a minimum, licensed appraisers supervised by state regulatory agencies such as the Arizona Board of Appraisal. *See* 12 U.S.C. § 3331 et. seq. Pursuant to 12 U.S.C. § 3348(c), any action of a state certified or licensed appraiser that is contrary to the purposes of this

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the Federal examination of financial institutions by the Office of the Comptroller of the Currency, the Federal Deposit Insurance Corporation, the Board of Governors of the Federal Reserve System, the Federal Home Loan Bank Board, and the National Credit Union Administration and make recommendations to promote uniformity in the supervision of these financial institutions. The Council's actions shall be designed to promote consistency in such examination and to insure progressive and vigilant supervision.

12 U.S.C. § 3348

. . .

(c) Reports to State certifying and licensing agencies

The Appraisal Subcommittee, any other Federal agency or instrumentality, or any federally recognized entity shall report any action of a State certified or licensed appraiser that is contrary to the purposes of this chapter to the appropriate State agency for a disposition of the subject of the referral.

chapter shall be reported to the appropriate State agency for a disposition of the referral.

As discussed previously, based upon appellant's extensive experience, I find that the appellant could not have reasonably questioned Englehorn's competency in this matter. The uncontradicted evidence in this matter is that a survey was conducted to ascertain whether the improvements were located on the Johnston property because it appeared that the improvements were located on the northern-most boundary of the property. *See* testimony of the appellant, HT at p. 573. Further, the appellant had previously contracted an appraisal of the property, whose competency he does not question, and that appraiser included the improvements in his appraisal. *See* testimony of the appellant, HT at 581. Thus, I find that the appellant could not have reasonably questioned Englehorn's competency because Englehorn included the off-site improvements in the appraisal. Therefore, I find that the appellant has failed to show that he was engaged in protected activity pursuant to the FIRREA when he made his disclosure to the Arizona Board of Appraisal. *See Haley*, 977 F.2d at 556-57.

Gross mismanagement

In addition, I find it inherently incredible that the appellant believed that an agency or DOJ official would attempt to secure a grossly misleading or fraudulent appraisal to support the payment of additional money in a condemnation proceeding when all of the officials, including the appellant, were aware that all appraisals for

condemnation actions were routinely reviewed for accuracy by not only the DOJ appraisal staff but also the agency appraisal staff. The routine was followed in this case. Klein gave the appraisal to Newman who in turn gave it to the appellant for routine review and comment and approval by Salazar. *See* testimony of the appellant, HT at pp. 578-79. Further, the appellant's technical disagreement with the Con Englehorn appraisal, even if true, does not constitute protected whistleblowing. *Cf. Ward v. Merit Systems Protection Board*, 981 F.2d 521, 525 (Fed. Cir. 1992) (the offering of an erroneous scientific recommendation or opinion is simply not shown to constitute mismanagement, let alone the gross mismanagement required by 5 U.S.C. § 2302(b)(8)).[3] Thus, I find that the appellant could not have reasonably believed that the payment for the off-site improvements could have constituted gross mismanagement.

Gross waste of funds

In addition, I find that the appellant could not have believed that the expenditure of $1,944.00 for off-site improvements during the condemnation process could have constituted a gross waste of funds. Even if he did not hear the agency's solicitor state that the owner must be compensated for the off-site buildings on the land acquired from the State through DOR, based upon the appellant's experience, I find that the appellant knew that

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[3] The value of the off-site structures in the Johnston property was $1,944.00, i.e., a structure identified as a Cook house/shop was appraised at $457 and the residence was appraised at $1,487. *See* testimony of Sue Klein, p. 210.

the agency would compensate the owner of the improvements on the land acquired by DOR. *See* testimony of the appellant, HT at p. 530 (the appellant's experience included testifying as an expert witness in condemnation cases). Thus, the appellant knew, or should have known, that reimbursement for the off-site buildings was not only necessary, but proper. *See Van EE v. Environmental Protection Agency*, 64 M.S.P.R. 693, 698 (1994).

Abuse of authority

The appellant also alleges that it was an abuse of authority to attempt to pay Johnston for his improvements through the condemnation action. However, the appellant has not shown that the agency intended to do so. The appellant merely assumed that this was the agency's intention because of Englehorn's error in including the off-site improvements in the appraisal. As stated earlier, I find that the appellant has failed to show that the inclusion of the off-site improvements was anything but error by the appraiser. Further, it was an error that had been committed earlier with no consequence. *See* testimony of the appellant, HT at p. 585. Thus, I find that the appellant has failed to show that the agency abused its discretion in connection with the Johnston property appraisal.

In sum, I find that the appellant has failed to show that his disclosure of the confidential information contained in the Englehorn appraisal of the Johnston property was a protected disclosure under 5 U.S.C. § 2302(b)(8).

The agency action does not violate 5 U.S.C. § 2302(b)(9)

In his prehearing submission, the appellant also alleges that the agency action constitutes a prohibited personnel practice because it violates his rights under 5 U.S.C. § 2302(b)(9). Pursuant to 5 U.S.C. § 2302(b)(9), any employee who has authority to take, direct others to take, recommend, or approve any personnel action shall not, with respect to such authority, take or fail to take, or threaten to take or fail to take, any personnel action against any employee or applicant for employment because of the exercise of any appeal, complaint, or grievance right granted by any law, rule, or regulation.

Here, the appellant provided no evidence in support of this allegation. The appellant alleged that he previously filed an equal employment opportunity complaint. However, the complaint was against another supervisor. The complaint was not against Newman. To the contrary, as a resolution to that complaint, the appellant's supervisor was changed so that he reported directly to John Newman, the Operations Director. Moreover, the appellant provided no evidence to show that either Newman or Schroeder, the deciding official, had a motive to retaliate against the appellant because of his previous discrimination complaint. *See Golden v. United States Postal Service*, 60 M.S.P.R. 268, 274 (1994). Thus, I find that the appellant has failed to show that the instant action was taken in retaliation for his previous discrimination complaint.

I note also that the appellant appears to argue that the instant action is in violation of 5 U.S.C. § 2302(b)(9) because he had a right to file a complaint under the FIRREA.

Upon review of this allegation, I agree with the agency that the appellant has failed to show that his complaint under the FIRREA would be protected under 5 U.S.C. § 2302(b)(9). As indicated by the agency, the Board has previously held that filing an appeal with the Board, availing oneself of a union grievance procedure, or lodging an Unfair Labor Practice complaint with the Federal Labor Relations Authority constitute examples of types of activities protected from reprisal by 5 U.S.C. § 2302(b)(9). *See Von Kelsch v. Department of Labor*, 59 M.S.P.R. 503, 508 (1993). The activities protected by 5 U.S.C. § 2302(b)(9) constitute the initial steps toward taking legal action against an employer for the perceived violation of an employee's rights. *Von Kelsch*, 59 M.S.P.R. at 508. In this case, the appellant was reporting alleged misconduct by another appraiser. Thus, I find that the appellant's report to the Arizona Board of Appraisal questioning the professional ethics and judgment of Englehorn, a private appraiser, cannot possibly be considered to be the initial step toward taking legal action against Reclamation, the appellant's employer. *See id.*

Accordingly, I find that the appellant has failed to show that the instant action was based on prohibited personnel practice in violation of 5 U.S.C. § 2302(b)(9). *See* 5 C.F.R. § 1201.56(a)(2)(iii) (it is the appellant's burden to prove his affirmative defense by preponderant evidence).

Discrimination based upon national origin

The appellant also claims that the action was based upon national origin discrimination. In order to establish a *prima facie* case of national origin discrimination, the appellant must show that: (1) he is a member of a protected group; (2) he suffered an adverse employment action; and, (3) there was a causal connection between his membership in the protected group and the adverse action which he suffered. *Thomas v. Office of Personnel Management*, 47 M.S.P.R. 369, 373 (1991).

In this case, the appellant is a member of a protected group, Hispanic. In addition, the appellant was subjected to an adverse action, a removal. However, he has provided no evidence to show that there was a causal connection between his Hispanic national origin and the removal action, e.g., the appellant has not shown that a non-Hispanic employee charged with the same misconduct, i.e., insubordination, failure to follow instructions, failure to cooperate with the U.S. Attorney's office during litigation, misuse of government resources and disclosure of confidential information, was treated differently. Thus, I find that the appellant has failed to meet his burden to establish even a prima facie case of discrimination based on his national origin.

The appellant has failed to show that the instant action violates 5 U.S.C. § 2302(b)(11).

The appellant also generally argued in his prehearing submission that the action was in violation of 5 U.S.C. § 2302(b)(11). However, the appellant presented no argument or evidence in support of this allegation. Therefore,

I find that the appellant has failed to support this bare allegation.

Harmful procedural error

The appellant also alleges that the agency committed harmful procedural error because it did not impose progressive disciplinary action. I find that the failure to impose progressive disciplinary action does not constitute harmful procedural error, i.e., harmful procedural error is defined by the Board as error by the agency in the application of its procedures that is likely to have caused the agency to reach a conclusion different from the one it would have reached in the absence or cure of the error. In this case, the appellant has not shown that the agency has adopted a procedure whereby it may not impose a removal penalty without the imposition of progressive discipline. *See* Initial Appeal File at Tab 19, Agency Exhibit 4-1. Moreover, the appellant's allegation that the removal penalty is too harsh will be discussed infra.

Penalty and efficiency of the service

The appellant also argues that the penalty is too harsh.

The deciding official, Dennis Schroeder, testified that he considered all of the charges were serious. He also testified that as Chief Appraiser, a supervisory position, the appellant was required to set an example for his staff. Thus, the offenses were more grievous in light of his position. Schroeder also considered the appellant's

actions to be intentional. *See* testimony of Dennis Schroeder, HT at 305-311. Schroeder testified that the appellant's behavior destroyed interagency trust and shattered Reclamation's relationship with the Department of Justice. *Id.* Schroeder also determined that the appellant's conduct undermined Reclamations' relationship with the NPS. *Id.* He also considered the lack of past disciplinary record, the lack of remorse which Schroeder decided exhibited a the lack of potential for rehabilitation. Schroeder also considered mitigating factors such as stress and work performance. However, Schroeder concluded that the mitigating factors did not warrant mitigation of the penalty because Schroeder lost confidence in the appellant's ability to follow the agency's policies, procedures and laws and to perform in the appellant's capacity as a supervisor.

In *Douglas v. Veterans Administration,* 5 M.S.P.R. 280, 303-306 (1981), the Board held that agencies should give consideration to all factors involved when deciding what penalty is appropriate, including not only the gravity of the offense, but such other matters as mitigating circumstnaces, the frequency of the offense, and whether the action accords with justice in the particular situation. The Board also suggested a list of factors which might be considered in reaching such a determination. Not all of the factors need be considered in every case, nor is the list intended to be all-inclusive. In reviewing the appropriateness of the penalty, the Board's function is to assure that the agency's managerial judgment has been properly exercised within the tolerable limits of reasonableness. *See Douglas,* 5 M.S.P.R. at 302.

I find that the deciding official, Dennis Schroeder, considered the appropriate factors in *Douglas*. I find that the appellant's 21 years of service and previous satisfactory work record do not mitigate the seriousness of his conduct. I also find that, as a supervisor, the agency has the right to hold the appellant to a higher standard of conduct than nonsupervisors because he occupied a position of trust and responsibility. *See, e.g., Tanner v. Department of Transportation*, 65 M.S.P.R. 169, 173-74 (1994). I also find that the appellant betrayed the trust and confidence placed in him by his supervisors because of the repeated nature of his misconduct and, as indicated by the deciding official, the appellant had several opportunities to reform his conduct but failed to do so. Thus, I agree with the agency that the appellant showed no remorse and has exhibited no potential for rehabilitation. Moreover, I agree with the agency that removal for the sustained charges, i.e., failure to properly coordinate disclosure of confidential and privileged information, repeated failure to follow instructions, failure to cooperate with the U.S. Attorney, insubordination, misuse of Government resources, misrepresentation of facts, and impeding the efficiency of the Service, promotes the efficiency of the service. *Cf. Farrier v. Department of Veterans Affairs*, 60 M.S.P.R. 71, 74 (1993) (penalty of removal was upheld for charges of insubordination and AWOL). Thus, I find that the agency has shown that the removal penalty is within the bounds of reasonableness. *See Brennan v. Department of Health and Human Services*, 787 F.2d 1559, 1563 (Fed. Cir. 1986), *cert. denied*, 479 U.S. 985 (1986) (the determination

of the appropriate penalty is a matter committed primarily to the agency's discretion). *See also Thomas v. Department of Defense,* MSPB Docket No. SL-0752-94-0393-I-1, slip op. at p.4, (Feb. 15, 1995) (the Board will modify the agency's chosen penalty only if it finds that the agency failed to weigh the relevant factors or that the agency's judgment clearly exceeded the limits of reasonableness).

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD: /s/ Antoinette C. Martinez
Antoinette C. Martinez
Administrative Judge

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

ROBERT E. GRIJALVA, Appellant, v. DEPARTMENT OF THE INTERIOR, Agency.	DOCKET NUMBER DE-0752-95-0061-I-1 DATE: 11/9/95

Thad M. Guyer, Esquire, *Suzanne M. Dohrer*, Esquire, Phoenix, Arizona, and *Thomas M. Divine*, Esquire, Washington, D.C., for the appellant.

Robert Moeller, Esquire, and *Katherine Ott Verburg*, Esquire, Phoenix, Arizona, for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Antonio C. Amador, Member

ORDER

After full consideration, we DENY the appellant's petition for review of the initial decision issued on April 21, 1995, because it does not meet the criteria for review set forth at 5 C.F.R. § 1201.115. We have not considered the appellant's untimely reply to the agency's response to the petition for review because it was not based on evidence not previously available. 5 C.F.R. § 1201.114(i). This is the Board's final order in this appeal. The initial decision in this appeal is now final. 5 C.F.R. § 1201.113(b).

NOTICE TO THE APPELLANT REGARDING FURTHER REVIEW RIGHTS

You have the right to request further review of the Board's final decision in your appeal.

Discrimination Claims: Administrative Review

You may request the Equal Employment Opportunity Commission (EEOC) to review the Board's final decision on your discrimination claims. *See* 5 U.S.C. § 7702(b)(1). You must submit your request to the EEOC at the following address:

Equal Employment Opportunity Commission
Office of Federal Operations
P. O. Box 19848
Washington, DC 20036

You should submit your request to the EEOC no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7702(b)(1).

Discrimination and Other Claims: Judicial Action

If you do not request review of this order on your discrimination claims by the EEOC, you may file a civil action against the agency on both your discrimination claims and your other claims in an appropriate United States district court. *See* 5 U.S.C. § 7703(b)(2). You should file your civil action with the district court no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(2). If

the action involves a claim of discrimination based on race, color, religion, sex, national origin, or a handicapping condition, you may be entitled to representation by a court-appointed lawyer and to waiver of any requirement of prepayment of fees, costs, or other security. *See* 42 U.S.C. § 2000e5(f); 29 U.S.C. § 794a.

Other Claims: Judicial Review

If you choose not to seek review of the Board's decision on your discrimination claims, you may request the United States Court of Appeals for the Federal Circuit to review the Board's final decision on other issues in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(b)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 30 calendar days after receipt of this order by your representative, if you have one, or receipt by you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD:

/s/ Robert E. Taylor
Robert E. Taylor
Clerk of the Board

Washington, D.C.

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals
for the Federal Circuit

96-3081

ROBERT E. GRIJALVA,

Petitioner,

v.

DEPARTMENT OF INTERIOR,

Respondent.

Judgment

(Filed Nov. 25, 1996)

ON APPEAl from the MERIT SYSTEMS PROTECTION BOARD

in CASE NO(S). DE0752950061-1-1

This CAUSE having been heard and considered, it is ORDERED and ADJUDGED.

Per Curiam (ARCHER, *Chief Judge,* NEWMAN and MICHEL, *Circuit Judges*):

AFFIRMED, *See* Fed. Cir. R. 36.

ENTERED BY ORDER OF THE COURT

DATED NOV. 25, 1996 /s/ Jan Horbaly
Jan Horbaly, *Clerk*

5 U.S. Code Cong. & Adm. News 3549, 103rd Congress-2nd Session (1994) ("Senate Report")

UNITED STATES OFFICE OF SPECIAL COUNSEL, MERIT SYSTEMS PROTECTION BOARD: AUTHORIZATION

P. L. 103-424, see page 108 Stat 4361

Dates of Consideration and Passage

House: October 3, 7, 1994
Senate: October 3, 7, 1994

Cong.Record Vol. 140 (1994)

House Report (Post Office and Civil Service Committee)
No. 103-769, Sept. 30, 1994
[To accompany H.R. 2970]

Senate Report (Governmental Affairs Committee)
No. 103-358, Aug. 23, 1994
[To Accompany S. 622]

[Editor's Note: The House bill was passed in lieu the Senate bill after amending its language to contain much of the text of the Senate bill.]

SENATE REPORT NO 103-358

[Page 3549]

The Committee on Governmental Affairs, to which was referred the bill (S. 622) to authorize appropriations for the United States Office of Special Counsel, and for other purposes, reports favorably thereon and recommends the bill as amended do pass.

* * * The purpose of S. 622 is to reauthorize OSC for three years and to ensure that OSC functions, as intended, to protect federal employee whistleblowers

from on-the-job harassment, negative job ratings, unfavorable transfers, denial of promotions and other retaliation for their efforts to uncover waste and mismanagement in their agencies

[Page 3550]

The Whistleblower Protection Act was passed in 1989, in large part because the Office of Special Counsel was perceived as being ineffectual. At that time, OSC had not brought a single corrective action case since 1979 to the Merit Systems Protection Board on behalf of a whistleblower.

* * * The Whistleblower Protection Act offered whistleblowers substantial new job protections that were not previously available:

First, the Act established a simpler and fairer standard for whistleblowers in proving retaliation by their agencies.

Second, it gave whistleblowers the right, for the first time, time, to appeal their own cases to the Merit Systems Protection Board.

[Page 3555]

* * *

Section 4(b) addresses the evidence an individual may use to prove that a disclosure was a contributing factor in the personnel action taken against him/her. This provision reverses the holding of *Clark v. Department of Army*, decided July 1, 1993, by the U.S. Court of Appeals for the Federal Circuit.

Prior to the *Clark* case, the Merit Systems Protection Board interpreted Section 1221(e)(1) to incorporate a knowledge/timing test that allowed a petitioner to prove that whistleblowing was a contributing factor by showing that "the official taking the action within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action." This test was taken from the Senate Report on the Whistleblower Protection Act, which expressly stated Congress' intent to incorporate such a standard.

[Page 3555-56]

In *Clark,* the Federal Circuit held that the Whistleblower Protection Act did not incorporate a per se knowledge/timing test. The court reasoned that the Senate report cited by the MSPB in creating the test referred to S. 508, the Whistleblower Protection Act of 1987, which was pocket vetoed by President Reagan and was never enacted. The court noted that S. 20, the bill which was ultimately enacted by the Congress in 1989, "lacks the language of S. 508 which provided for the knowledge/timing test." 6

In fact, however, the joint explanatory statement that accompanied both S. 508 and S. 20 expressly stated that the managers intended the per se test to apply to that bill. The joint statement states:

> One of many possible ways to show that the whistleblowing was a factor in the personnel action is to show that the official taking the action knew (or had constructive knowledge) of the disclosure and acted within such a period of time that a reasonable person could conclude

that the disclosure was a factor in the personnel action. 7

* * *

Accordingly, the amendment in Section 4(b) would restore the balance intended in the Whistleblower Protection Act, by permitting a Whistleblower to prove his/her prima facie case by showing that the "official taking that action had actual or constructive knowledge of the disclosure and acted within such a period of time that a reasonable person could conclude that the disclosure was a factor in the personnel action." As stated in the Joint Explanatory Statement, this would be only one of many possible ways that a whistleblower could use to establish a prima facie case.

The Committee also notes that the Whistleblower Protection Act creates a clear division between a whistleblower's prima facie case, which must be proven by a preponderance of the evidence, and an agency's affirmative defense, which must be proven by clear and convincing evidence. The Committee amendment reaffirms that Congress intends for an agency's evidence of reasons why it may have acted (other than retaliation) to be presented as part of the affirmative defense and subject to the higher burden of proof.

[Page 3558-59]

The Committee * * * reaffirms the plain language of the Whistleblower Protection Act, which covers, by its terms, "any disclosure", of violations of law, gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety. The Committee stands by that language, as

explained in its 1988 report on the Whistleblower Protection Act. That report states:

> The committee intends that disclosures be encouraged. The OSC, the Board and the courts should not erect barriers to disclosures which will limit the necessary flow of information from employees who have knowledge of government wrongdoing. For example, it is inappropriate for disclosures to be protected only if they are made for certain purposes or to certain employees or only if the employee is the first to raise the issue. S. 508 emphasizes this point by changing the phrase "a disclosure" to "any disclosure" in the statutory definition. This is simply to stress that any disclosure is protected (if it meets the requisite reasonable belief test and is not required to be kept confidential.

* * *

As indicated above, the plain language of the Whistleblower Protection Act extends to retaliation for "any disclosure", regardless of setting of the disclosure, the form of the disclosure, or the person to whom the disclosure is made.

H.R. Rep. 103-769, 103d Cong., 2d Sess. 12 (1994) ("House Report")

REAUTHORIZATION OF THE OFFICE OF SPECIAL COUNSEL

September 30, 1994- Committed to the Committee of the Whole House on the State of the Union and ordered to be printed

Mr. Clay, from the Committee on Post Office and Civil Service, submitted the following

REPORT

[To Accompany H.R. 2970]

* * *

[Page 12]

STATEMENT

MANDATE FOR PROTECTION AND NEED FOR CHANGE

* * *

Whistleblowers are right too often to ignore. As the agents for accountability and change, they are the human factors who expose bureaucracies that are dishonest and shake up those that are stagnant.

The necessity for significant change to structurally reform current whistleblower protection law is beyond credible debate. The Act's legislative mandate is unsurpassed. * * * Unfortunately, while the Whistleblower Protection Act is the strongest free speech law that exists on paper, it has been a counterproductive disaster in practice. The WPA has created new reprisal victims at a far greater pace than it is protecting them.

* * *

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MERIT SYSTEMS PROTECTION AND JUDICIAL REVIEW

The track record has not been significantly better for WPA litigation options. A due process forum inherently provides increased opportunities for relief thorough judgment or settlement. However, the statistical record indicates that the MSPB and Federal Circuit Court of Appeals have not been favorable to Federal whistleblowers. * * * Instead of restoring balance, the U.S. Court of Appeals for the Federal Circuit has been more hostile than the Board. Since its 1982 creation, in its reported decisions employees have prevailed only twice on the merits with the whistleblower defense. [Citing, *Sullivan v. Dept. of Navy,* 720 F.2d 1266 (Fed. Cir. 1983); *Marano v. Dept. of Justice,* 2 F.3d 1137 (Fed. Cir. 1993).] The committee received extensive testimony at hearings that the MSPB and Federal Circuit have lost credibility with the practicing bar for civil service cases. * * *

The body of case law developed by the Board and Federal Circuit has represented a steady attack on achieving the legislative mandate for effective whistleblower protection. Various decisions [cited at n. 15] have held that the WPA – * * * *(3)* does not protect those whose disclosures evidence violation of laws with enforcement discretion [*Haley v. Department of Treasury,* 977 F.2d 553 (Fed. Cir. 1992)]; (4) limits protection in Board proceedings to the record already presented to the OSC [*Knollenberg v. Department of Navy,* 47 M.S.P.R. 92 (1991), *aff'd sub*

nom Knollenberg v. Merit Systems Protection Board, 953 F.2d 263 (Fed. Cir. 1992)]; * * * *(6)* does not require the Board to probe behind agency assertions that provision of interim relief would be disruptive, and does not require return of an employee to his original duties [*Weimers v. Merit Systems Protection Board*, 792 F.2d 1113 (Fed. Cir. 1986)]; (7) does not have to provide back pay for employees who were suspended during investigations but subsequently cleared and restored to duty [*Nicholas v. Department of Air Force, No.* 92-3479 (Fed. Cir. Feb. 8, 1993)]; (8) does not offer relief when an agency believed that outside attention to the employee's protected whistleblowing upset coworkers [*DeSarno v. Department of Commerce*, 761 F.2d 657 (Fed. Cir. 1985)]; [and] (9) does not preclude ex parte contacts between the proposing and deciding officials in intra-agency adjudications, or even preclude them from being the same person [*Baracco v. Department of Transportation*, 15 M.S. P. R. 112 (1983), *aff'd* 735 F.2d 488 (Fed. Cir. 1984)] * * * These decisions are illustrative, not exhaustive. They all, however violate the WPA's clear mandate through statutory provisions or legislative intent.

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* * *

The Federal Circuit's decision in *Clark v. Department Army*, 997 F.2d 1466 (Fed. Cir. 1993), *cert. denied* 114 S. Ct. 920, illustrates the vulnerability of whistleblowers' legal rights. In *Clark*, the court erased the Act's clear legislative intent that protected whistleblowing may not play any

factor in personnel actions, unless the agency demonstrates by clear and convincing evidence that it was an immaterial factor.

Clark effectively canceled the whistleblower defense, by permitting an agency simultaneously to defeat a prima facie case through meeting the same burden of supporting its personnel action that exists under section 7701(c) whether or not the employee raises an affirmative defense.

* * *

The committee recognizes that realistically it is impossible to overturn destructive precedents as fast as they are issued by the MSPB or Federal Circuit. H.R. 2970 attempts to restore the balance to precedents interpreting the Whistleblower Protection Act by creating badly needed competition – a choice of fact-finding fora between existing remedies and civil action providing for jury trials in U.S. District court; and (2) elimination of the Federal Circuit's monopoly on judicial review of Board decisions by also permitting jurisdiction in the U.S. circuit court of appeals where a petitioner resides. The structural changes will provide whistleblowers with the same access to court enjoyed by citizens generally.

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* * *

While acknowledging that the new structure established in H.R. 2970 will not be the most administratively convenient, the committee found that there will be expanded access to the appellate courts for the petitioner, the expanded jurisdiction will bring in panels with greater expertise in labor law, and any disparities in

appellate holdings will ultimately strengthen the Federal whistleblower protection structure by focusing on disputed legal areas and thereby enabling Congress or the Supreme Court to resolve the matter.

* * *

140 Cong. Rec. H11422 (daily ed. October 7, 1994) (statement of Mr. McCloskey) ("Floor Statement")

Proceedings and Debate of the 103rd Congress, Second Session Amendments to the Whistleblower Protection Act
Friday, October 7, 1994

* * *

HOUSE FLOOR STATEMENT

Mr. McCLOSKEY:

Mr. Speaker, I Ask unanimous consent that the Senate amendment [No. 2641 to S14668] be considered as read and printed in the RECORD.

* * *

It also is not possible to further clarify the clear statutory language in section 2302(b)(8)(A) that protection for "any" whistleblowing disclosure evidencing a reasonable belief of specified misconduct truly means "any". A protected disclosure may be made as part of an employee's job duties, may concern policy or individual misconduct, and may be oral or written and to any audience inside or outside the agency, without restriction to time, place, motive, or context. In 1989, Congress explicitly changed the language in section 2302(b)(8) from protecting "a" disclosure to protecting "any" disclosure, specifically to prohibit those type exceptions. If information is classified or its release is specifically prohibited by statute, employees must disclose it through specified confidentiality channels to maintain protection. Otherwise there are not exceptions.

Supreme Court, U.S.
FILED
APR 28 1997
OFFICE OF THE CLERK

(2)

No. 96-1361

In the Supreme Court of the United States

OCTOBER TERM, 1996

ROBERT E. GRIJALVA, PETITIONER

v.

DEPARTMENT OF INTERIOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
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10 pp

QUESTION PRESENTED

Whether the court of appeals correctly upheld the Merit System Protection Board's determination that petitioner failed to prove that he made a disclosure protected by the Whistleblower Protection Act, 5 U.S.C. 2302(b)(8)(A).

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In the Supreme Court of the United States

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 47), which affirmed the decision of the Merit Systems Protection Board (MSPB), is unreported. The opinion of the MSPB (Pet. App. 44-46), which denied the petition for review, is unpublished but is noted at 71 M.S.P.R. 567 (Table). The Initial Decision of the MSPB Administrative Judge (Pet. App. 1-43) is unreported.

JURISDICTION

The order of the court of appeals was entered on November 25, 1996. The petition for a writ of certiorari was filed on February 24, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner served as a supervisory and review appraiser in the Department of the Interior's Phoenix Area Office of the Bureau of Reclamation. Pet. App. 2. In that capacity, petitioner supervised subordinate appraisers and reviewed the appraisals performed by both agency and independent appraisers. *Ibid.* In February 1994, the agency began proceedings to remove petitioner from his position based on his failure to coordinate disclosure of confidential and privileged information, repeated failures to follow instructions, failure to cooperate with the United States Attorney, insubordination, misuse of government resources, misrepresentation of facts, and impeding the efficiency of the agency. *Id.* at 2-3. Petitioner challenged his dismissal before the MSPB. Following a two-day hearing, the MSPB administrative law judge affirmed the agency action in all respects. *Id.* at 2.

1. The charge that petitioner failed to coordinate disclosure of confidential and privileged information arose out of petitioner's review of an appraisal of a property owned by Zane and Donna Johnston. Pet. App. 3, 5. In preparation for litigation regarding condemnation of the Johnston property, the United States Attorney for the District of Arizona hired Con Englehorn, an independent appraiser, to serve as an expert witness and to prepare an appraisal of the property. *Id.* at 5. Englehorn's appraisal was submitted to petitioner for review. *Ibid.* The Englehorn appraisal included in its valuation the worth of several structures that were not located on the property. *Id.* at 28. The precise property lines of the Johnston property were unclear, requiring a

detailed survey. *Id.* at 31. In an earlier proceeding, petitioner had hired another outside appraiser to conduct an appraisal of the property. That appraisal, like the Englehorn appraisal, mistakenly included the off-site structures. *Ibid.*

After reviewing Englehorn's appraisal of the Johnston property and discovering the mistaken inclusion of the off-site structures, petitioner filed a complaint against Englehorn with the Arizona State Board of Appraisal, asserting that in his appraisal, Englehorn violated an ethics provision, specific appraisal standards, and state law. Pet. App. 6. Petitioner did not notify the United States Attorney that he had filed a complaint against its expert. *Ibid.*

In removing petitioner from his position, the agency charged that petitioner improperly disclosed confidential information in his complaint against Englehorn. The complaint included detailed descriptions of Englehorn's appraisal, which was prepared for use during litigation. Pet. App. 7. In addition, petitioner's disclosure severely prejudiced the United States Attorney in the prosecution of the Johnston condemnation litigation, forcing the government to delay the proceedings, hire another expert witness, and commission a new appraisal. *Ibid.*

2. Petitioner challenged his dismissal in part on the ground that the disclosure of the Englehorn appraisal was protected by the Whistleblower Protection Act (WPA), 5 U.S.C. 2302(b)(8)(A). That provision prohibits federal agencies from taking personnel action against employees for disclosing information that the employee "reasonably believes evidences * * * a violation of any law, rule, or regulation, or * * * mismanagement, a gross waste

of funds, an abuse of authority, or a substantial and specific danger to public health or safety."

The administrative law judge concluded that petitioner lacked a reasonable belief that the Englehorn appraisal evidenced any of the abuses outlined in the WPA. Pet. App. 30-36. In reaching that conclusion, the ALJ relied on petitioner's extensive experience as an appraisal reviewer, his knowledge of the previous appraisal that included the same error, and his awareness of the difficulties involved in determining the Johnston property lines. In addition, petitioner admitted that he lacked evidence of any statutory violation and acknowledged that he knew that the Englehorn appraisal was going to be reviewed by others in the agency before being authorized for use in the condemnation proceedings. The ALJ also found that petitioner knew that the agency believed that it was legally obligated to compensate the owner of the structures regardless of whether they were located off-site. *Ibid.*

3. On October 9, 1995, the MSPB denied petitioner's petition for review of the ALJ findings. Pet. App. 44-46. On November 25, 1996, the Federal Circuit affirmed the MSPB decision. *Id.* at 47.

ARGUMENT

The court of appeals correctly affirmed the MSPB's decision to sustain petitioner's removal. The holdings below are essentially fact-specific and do not conflict with any decision of this Court, another court of appeals, or any statute or regulation.

Under the WPA, the government may not take employment action as a reprisal against an employee who discloses information that the employee "reasonably believes" manifests a violation of statute or

regulation, or otherwise represents a form of abuse. 5 U.S.C. 2302(b)(8)(A). Petitioner argues (Pet. 12-13) that, in determining whether he had a reasonable belief that the Englehorn appraisal evidenced one of the abuses described in the WPA, the ALJ improperly focused on petitioner's subjective motivation. According to petitioner (Pet. 14-17), the WPA protects employees who disclose information based on a reasonable belief that the disclosure evidences a violation of law, regulation, or other abuse, even if the employee did not actually hold that belief. That argument is both incorrect as a matter of law and inapplicable to the findings in this case.

Nothing in the ALJ decision purports to apply a subjective test under the WPA. Indeed, petitioner acknowledges that the ALJ "avoided express findings that [petitioner] was ill-motivated toward Englehorn." Pet. 12. Instead, petitioner cites (*ibid.*) a portion of the decision in which the ALJ noted that petitioner had not filed a complaint against the appraiser who conducted the earlier appraisal of the Johnston property, an appraisal that included the same error as Englehorn's. Although petitioner argues (Pet. 13) that that portion of the decision suggests that petitioner was motivated by a desire "to get Englehorn," the cited portion of the decision simply makes the point that the error in the Englehorn appraisal was an innocent one, given that another appraiser had made the same mistake. Thus, nothing in the ALJ decision refers to, let alone relies on, petitioner's subjective motivation in filing the complaint against Englehorn.

Moreover, even if the ALJ did inquire into petitioner's subjective motivation, that inquiry is not barred by the WPA. As the government argued below,

"[t]he word 'reasonably' is an adverb modifying the word belief, but it is the employee who must hold the (reasonable) belief." Pet. 13. Under the WPA it is not enough that a disclosure be based on a *conceivable* reasonable belief. Rather, the WPA protects an employee who himself "reasonably believes" that disclosed information manifests one of the abuses described in 5 U.S.C. 2302(b)(8)(A). In protecting disclosures based on such a reasonable belief, the WPA requires both that the employee actually hold such a belief and that the belief be reasonable.

Finally, even if we assume that the ALJ did inquire into petitioner's subjective beliefs and that it was improper to do so, that alleged error could not have affected the outcome of this case because the ALJ also found that there was no objectively reasonable belief to support the conclusion that the Englehorn appraisal manifested a violation of law, regulation, or rule, or otherwise amounted to abuse. Pet. App. 30-35. The record before the ALJ contained substantial evidence to support that conclusion, and petitioner does not challenge that conclusion in his petition for certiorari. Given the uncontested finding that petitioner lacked an objectively reasonable belief that the Englehorn appraisal evidenced one of the abuses described in 5 U.S.C. 2302(b)(8)(A), the court of appeals did not err in affirming the MSPB.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
DAVID M. COHEN
HILLARY A. STERN
Attorneys

APRIL 1997